IN THE

# Supreme Court of the United States

——— Term, 1977

No. 77-319

JOSEPH SICA,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Your petitioner, Joseph Sica, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit in the above captioned case.

## OPINIONS BELOW

The district court's memorandum and order dated May 19, 1975 is not reported but is set forth herein at Appendix A. The district court's memorandum and order dated October 29, 1975 is reported at 404 F. Supp. 602 (W.D. Pa. 1975) and is set forth herein at Appendix B.

The court of appeals' opinion and order dated October 20, 1976 reversing Sica's conviction is not reported but is set forth herein at Appendix C. The court of appeals' order dated December 16, 1976 granting appellee's

petition for rehearing and vacating the order of October 20, 1976 is set forth herein at Appendix D. The court of appeals' opinion and order dated July 6, 1977 affirming Sica's conviction is not yet reported but is set forth herein at Appendix E. The court of appeals' order dated August 2, 1977 denying appellant's petition for rehearing is set forth herein at Appendix F.

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## JURISDICTION

The court of appeals issued an order denying the petition for rehearing on August 2, 1977, and the within petition for a writ of certiorari is being filed within thirty days of said order. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

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## QUESTIONS PRESENTED

I. Whether the Hobbs Act, 18 U.S.C. §1951, proscribes "attempted extortion"?

II. Whether the evidence is sufficient to prove a violation of the Hobbs Act, 18 U.S.C. §1951, by extortion or attempted extortion?

III. Whether it was a denial of due process of law to refuse petitioner's motions for severance and thus deprive him of the testimony of a co-defendant who was willing to testify at a separate trial and would have contradicted the only inculpatory testimony against petitioner?

IV. Whether a defendant at a joint trial is entitled to a severance after the Government has rested and before a co-defendant presents defense testimony in order that the jury may consider only the Government's evidence against him?

V. Whether the jury should have been instructed with the standard accomplice charge and its corollary under *Cool v. United States,* 409 U.S. 100, 93 S.Ct. 354 (1972) when a co-defendant testified in his own behalf and presented both inculpatory and exculpatory evidence against petitioner?

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## STATUTE INVOLVED

**18 U.S.C. §1951. Interference with commerce by threats or violence**

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section—

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.



(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45.

June 25, 1948, c. 645, 62 Stat. 793.

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## STATEMENT OF THE CASE

### History

On February 26, 1975, your petitioner Joseph Sica was indicted at criminal number 75-080 in the United States District Court for the Western District of Pennsylvania. The indictment named two co-defendants, Frank Joseph Rosa and Vincent Mannella, and charged all three individuals with two counts of violating the provisions of Title 18, United States Code, Section 1951, the "Hobbs Act". Count one, which was dismissed by the district court during trial, alleged a conspiracy to violate §1951. Count two alleged that from July 23, 1974 to August 15, 1974, in the Western District of Pennsylvania and elsewhere, Sica, Rosa and Mannella did unlawfully and wilfully attempt to obstruct, delay and affect interstate commerce and the movement of articles and commodities in commerce by extortion, i.e., defendants did attempt to obtain property of the value of $10,000 in the form of money from one Joseph Vacarello, Jr., as agent and owner of Penn Landscape and Cement Work with his consent induced by wrongful use of fear in that defendants did threaten Vacarello and his company with the loss of the "Overlook Park" project and other con-

tracts unless and until Vacarello and his company paid the said amount of money to defendants.

On August 5, 1975, a jury trial of the indictment against all defendants was convened before the Honorable Barron P. McCune, District Judge. On August 12, 1975, the jury returned a verdict of guilty as to all defendants on count two. Sica filed motions for judgment of acquittal, new trial and arrest of judgment; but said motions were denied by the lower court. Subsequently, Sica was sentenced to pay a $10,000 fine and to serve a term of imprisonment for five years with eligibility for parole under 18 U.S.C. §4208(a)(1) upon serving six months of said term.

On October 20, 1976, a panel of the United States Court of Appeals for the Third Circuit reversed the judgment of sentence. But, on December 16, 1976, the court of appeals en banc granted the Government's petition for rehearing and vacated the order of October 20, 1976. After rehearing, the court of appeals en banc with three judges dissenting affirmed the judgment of sentence on July 6, 1977. Sica's petition for rehearing was denied on August 2, 1977.

## Facts

The first of two Government witnesses, Katherine Vlack Kendall, testified that she was employed by Mannella Engineers as a secretary during the summer of 1974. At some point during that summer, Frank Joseph Rosa, a business client of Mannella Engineers, and Joseph Sica arrived to see Vincent Mannella. Kendall did not remember the date of this meeting and could not say it was July 23. While Rosa and Sica were with Mannella, Kendall, upon Mannella's request, called Joseph Vacarello and asked him to come to the office of Mannella Engineers. Vacarello arrived shortly thereafter and entered Mannella's private office. Kendall had no knowledge of what transpired in Mannella's office; she did not see or hear anything. Kendall also testified that she only saw Rosa and Sica together at the office of Mannella Engineers on one occasion during the summer of 1974, and that she never saw Sica in the office after the above mentioned meeting with Mannella.



The other Government witness, Joseph Vacarello, testified that he is part owner of a landscaping and contracting business, Penn Landscape and Cement Work Company, which is located in the Pittsburgh area. He has done work for the Borough of Monroeville which includes the development of three recreational park areas: Hawkeye Park, Ferndale Park and Overlook Park. Vacarello's bid on the Overlook Park project (Government Exhibit #2) was submitted on July 9, 1974; his company's bid was the lowest base bid at $128,600.

On July 23, 1974, Vacarello received a telephone call from Mannella with whom he enjoyed a business relationship. At Mannella's request, Vacarello went to Mannella's office where he was introduced to a Mr. Rosa and a Mr. Sica[1]. Vacarello stated that the Overlook Park project was one of the topics discussed during the approximately ten minutes which he spent in Mannella's office. Sica explained that he represented several councilmen from Monroeville, and there was a "problem" with the Overlook Park project. He stated that ". . . we would like to see you get the job but we would like a

1. Vacarello was unable to identify defendant-appellant Sica as the same individual who was introduced to him and spoke to him in Mannella's office on July 23, 1974.

donation". The gist of the conversation was if Vacarello was experiencing a problem in securing the contract on the Overlook Park project, he could probably help himself by making a donation. No specific amount of money was mentioned; he was simply told that Mannella would contact him later. Vacarello testified that he did not consider this donation request to be out of the ordinary in any way; in the contracting business, it is not unusual to be asked for a donation. Also, at no point during the July 23 meeting was there any discussion coincerning potential or actual suppliers of materials for the Overlook Park project.

Vacarello stated that the meeting was friendly and without hostility; no threats or demands were made and he was not placed in fear of physical or economic harm. Sica never requested any specific amount of money from Vacarello, nor did Sica do or say anything to put Vacarello in fear at the July 23 meeting or at any time thereafter. Vacarello was not at all fearful of Sica, Rosa or Mannella; and he was not at all concerned about being awarded the Overlook Park contract as a result of the meeting.

Vacarello testified that he was involved in a dispute with the Borough of Monroeville concerning work his company had done a year earlier in Hawkeye Park. In settlement, the Borough paid $2,000 over the bid contract price to Vacarello. As a result of the dispute, certain Borough officials had developed "hard feelings" toward Vacarello. Also, a controversy over zoning matters between his brother Nick and the Borough could have affected the relationship between Vacarello's company and the Borough of Monroeville.



Vacarello testified that late in the afternoon of July 23, 1974, Mannella telephoned him and asked him to return to Mannella's office. Vacarello proceeded to Mannella's office where he saw and met with only Mannella who told Vacarello that the amount of the donation in regard to the Overlook Project was $10,000; this was the first occasion on which money was discussed. Mannella stated that the money was to be paid in cash to him. Vacarello responded that the amount was ridiculously high and he would not pay it or even $5,000. Mannella then showed to Vacarello a copy of the minutes of the Monroeville Recreation Committee meeting (Government Exhibit #4). These minutes disclosed that Committee members had recommended that Vacarello not be awarded the Overlook Park contract due to their dissatisfaction with his company's past performance on the Hawkeye Park project. Vacarello realized he had a "problem" but still refused to make the donation. When Vacarello mentioned bidding on other contracts for Monroeville Borough, Mannella told him to save his time and money. Vacarello then departed Mannella's office.

Vacarello stated that he never paid any money to any individual in regard to the Overlook Park project, and after July 23, 1974, neither Mannella nor anyone else asked him to make such a payment. On July 31, 1974, after a public meeting of the Monroeville Borough council, Vacarello's company was awarded the Overlook Park contract (Government Exhibit #7) which was formally executed on August 15, 1974. Mannella was glad when Vacarello received the contract, but Mannella never suggested that Vacarello pay the previously requested donation or any part thereof. After July 23, Mannella showed absolutely no interest in that money even though Mannella and Vacarello were often together on other busi-

ness during that summer. Subsequent to the meeting on July 23, Vacarello did not speak with Sica or Rosa concerning any matter in regard to Overlook Park.

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## REASONS FOR GRANTING A WRIT OF CERTIORARI

### I.

Petitioner Sica poses an important question of federal law which has not been, but should be, settled by this Court. He asks this Court to determine whether the Hobbs Act, 18 U.S.C. §1951,[2] proscribes "attempted extortion".

The instant indictment, alleging a violation of the Hobbs Act, reads:

> "That on or about July 23, 1974, and continuing until on or about August 15, 1974, in the Western

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2. The Hobbs Act, 18 U.S.C. § 1951, sets forth, in pertinent part, the following:

> § 1951. Interference with commerce by threats or violence
>
> "(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or iimprisoned not more than twenty years, or both."
>
> (b) As used in this section— . . .
>
> (2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.



> District of Pennsylvania and elsewhere, the defendants, FRANK JOSEPH ROSA, a/k/a "JOE", JOSEPH SICA and VINCENT MANNELLA, did unlawfully and wilfully *attempt to obstruct, delay and affect interstate commerce,* as the term "commerce" is defined in and by Section 1951, Title 18, United States Code, and the movement of articles and commodities in commerce *by extortion as the term "extortion" is defined in and by Section 1951, Title 18, United States Code;* that is to say the said defendants did wrongfully and unlawfully attempt to obtain property of the value of $10,000 in the form of money from Joseph Vacarello, Jr., as agent and owner of Penn Landscape and Cement Work with his consent induced by wrongful use of fear in that the said defendants did threaten the said Penn Landscape and Cement Work and Joseph Vacarello, Jr., with loss of the "Overlook Park" project and other contracts unless and until the Penn Landscape and Cement Work and Joseph Vacarello, Jr., paid the defendants the said amount of money. (Emphasis supplied.)
>
> "All in violation of Title 18, United States Code, Section 1951."

The trial court instructed the jury and wrote in its opinion that the crime alleged in the instant indictment was "attempted extortion". Sica believes such a view to be erroneous and argues that the Hobbs Act does not proscribe such conduct. The language of the statute is clear; the criminal conduct is not the attempt to extort but the attempt to obstruct, delay or affect commerce by robbery or extortion.[3] The language of the

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3. The words "attempt so to do" in the Hobbs Act refer to obstructing, delaying or affecting commerce; grammatically, the words do not refer to robbery or extortion.

indictment is consistent with that of the statute; it alleges that the defendants did" . . . attempt to obstruct, delay and affect interstate commerce . . . by extortion . . .".

Petitioner Sica's argument is bolstered by a review of the applicable judicial precedent. In deciding cases concerning 18 U.S.C. § 1951, this Court has not included "attempted extortion" as one of the crimes proscribed by the statute. In *United States v. Green,* 350 U.S. 415, 420, 76 S.Ct. 522, 526 (1956), the Court said: ". . . [I]n our view the legislation (the Hobbs Act) is directed at the protection of interstate commerce against injury from *extortion* . . ." (emphasis supplied). In *Stirone v. United States,* 361 U.S. 212, 80 S.Ct. 270 (1960), the Court said that the Hobbs Act ". . . speaks in broad language, manifesting a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by *extortion,* robbery or physical violence" (361 U.S. at 215, 80 S.Ct. at 272; emphasis supplied), and that ". . . there are two essential elements of a Hobbs Act crime: interference with commerce and *extortion* (361 U.S. at 218, 80 S.Ct. 274; emphasis supplied). In a decision affirmed by the Supreme Court, *United States v. Enmons,* 335 F. Supp. 641, 644 (E.D. La. 1971), affd. 410 U.S. 396, 93 S.Ct. 1007, it was written:

> "Hence, under the Hobbs Act, in order to constitute a crime, *one must obstruct, delay, or affect interstate commerce or attempt to do so, by 'robbery or extortion'* whether or not physical violence, or threats of physical violence to persons or property is used." (Emphasis supplied.)



**II.**

Petitioner Sica contends that the evidence is not sufficient to prove he violated the Hobbs Act by extortion or attempted extortion.

It is a well established principle that a defendant can only be tried upon the indictment returned against him, and the charges therein cannot be broadened through amendment except by a grand jury. *Ex Parte Bain,* 121 U.S. 1, 9-10, 7 S.Ct. 781, 786 (1887); *Stirone v. United States, supra; Russell v. United States,* 369 U.S. 749, 82 S.Ct. 1038 (1962). "The concern represented by these cases is that the indictment under which the accused is prosecuted remains the same one as brought by the grand jury rather than becoming through 'interpolation the indictment of the prosecutor or the court' ". *United States v. De Cavalcante,* 440 F.2d 1264, 1270-1271 (3d Cir. 1971). It is also well established that a verdict of guilty cannot be sustained without ". . . proof beyond a reasonable doubt of every fact necessary to constitute the crime . . .". *In Re Winship,* 397 U.S. 358, 364, 90 S.Ct. 1068, 1073 (1970). Here, the language of the indictment charges Sica with the ". . . attempt to obstruct, delay and affect interstate commerce . . . by extortion as the term 'extortion' is defined in and by . . ." the Hobbs Act. In order to sustain a conviction under this indictment, extortion as it is defined in the Act must be proven beyond a reasonable doubt. Such proof is absent in the evidence of record. In fact, it is uncontroverted that neither Sica nor his co-defendants obtained property from another; the $10,000 recited in the indictment never was paid by Vacarello to Sica, his co-defendants or anyone else. Although he was awarded the Overlook Park contract, Vacarello never paid any

amount of money to any individual in regard to that contract. Since the essential element of extortion was not established, the specific charges in the indictment have not been proven and the verdict cannot be sustained.

Assuming *arguendo* that the Hobbs Act does forbid "attempted extortion", the questions arise whether or not that crime is proven by the evidence and, if it is, whether or not Sica is guilty of it. "Attempt", while not specifically defined in 18 U.S.C. § 1951, means "an effort or endeavor to accomplish a crime, amounting to more than mere preparation or planning for it, which, if not prevented, would have resulted in the full consummation of the act attempted, but which, in fact, does not bring to pass the party's ultimate design". *Black's Law Dictionary* 162 (Revd. 4th Ed. 1968). "Extortion" is defined in 18 U.S.C. § 1951 as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right". The evidence discloses that on the morning of July 23, 1974, a Mr. Sica[4] and defendants Rosa and Mannella met with Vacarello and, among other things, discussed the Overlook Park project on which Vacarello's contracting firm had placed the lowest bid fourteen days earlier. Sica mentioned Vacarello's "problem" in regard to being awarded the contract, and then, on behalf of several Borough councilmen, stated that: ". . . we would like to see you get the job but we would like a donation". Vacarello was not asked for any specific amount of money; he was told that Mannella would contact him later. Concerning this morning meeting on

4. Vacarello was unable to identify petitioner Sica as the gentleman with whom he conversed in Mannella's office on July 23, 1974.



July 23, 1974, the trial court instructed the jury that there was no attempt to extort as a matter of law.

Subsequent to the morning meeting on July 23, 1974, Vacarello never spoke with the unidentified Mr. Sica in regard to a donation or any aspect of the Overlook Park project. Since attempted extortion did not occur at the only meeting where both Vacarello and Sica were present, Sica has not been shown to have committed the crime (as defined by the trial court) which was charged. It is submitted that the words and actions of Mannella at the meeting between him and Vacarello can not be imputed to Sica. There is no basis in the record for assuming that Mannella spoke and acted with the knowledge and authorization of Sica. Moreover, there is no evidence that Sica had agreed with Mannella as to details, i.e., the precise words, approach and amount of the donation.

Even if the words and actions of Mannella can somehow be attributed to Sica, the evidence presented by the Government in the case *sub judice* still fails to demonstrate that he aided or abetted an attempted extortion. For, it is Sica's contention that no attempted extortion was committed at the meeting between Mannella and Vacarello during the afternoon of July 23, 1974 or at any other time. To prove "extortion", the Hobbs Act requires a showing that property was obtained by force, violence or fear. "It has been held that to prove an attempt to extort it is necessary to show an attempt to arouse fear . . ." *United States v. Nadaline,* 471 F. 2d 340, 343 (5th Cir. 1973), cert den. 411 U.S. 951, 93 S.Ct. 1924. Here, it is certain that the meeting with Mannella and his request for a $10,000 donation did not in fact cause Vacarello to be fearful of phy-

sical or economic harm; Vacarello was never fearful in any way of Mannella, Sica or Rosa. Furthermore, it is certain that neither Mannella's words nor actions constituted an *attempt* to arouse fear in Vacarello. If fear of economic loss was aroused in Vacarello, it was not instilled by Mannella but by an act of the Monroeville Recreation Committee which had occurred prior to the afternoon meeting between Mannella and Vacarello on July 23, 1974. Said Committee recommended that Vacarello, even though he was the lowest bidder,[5] not be awarded the Overlook Park contract due to the Committee's dissatisfaction with his company's past performance on Borough construction projects. Thus, Mannella was not attempting to imply that problems would be caused if the donation was not made, nor was he attempting to threaten Vacarello since, at that moment, the Borough of Monroeville did not appear willing to award the contract to Vacarello. Instead, Mannella was offering a possible solution by which Vacarello might induce certain action, i.e., the awarding of the Overlook Park contract to Vacarello's company. Under these circumstances, Mannella was not attempting to extort money from Vacarello. As the Third Circuit stated in *United States v. Addonizio,* 451 F. 2d 49, 72 (3d Cir. 1971), cert. den. 405 U.S. 936, 92 S.Ct. 949:

> "The Hobbs Act definitions of robbery and extortion are taken from New York law. *United States v. Nedley,* 255 F. 2d 350 (3d Cir. 1958). The definition of extortion at the time of the Hobbs Act's enactment was found in former New York Penal Law § 850, McKinney's Consol. Laws, c. 40. In interpreting § 850, the New York courts distinguished extortion from bribery. Thus, in *Hornstein v. Paramount Pictures,* 22 Misc. 2d 996, 37 N.Y.S. 2d 404 (1942), the court pointed out that while bribery was a voluntary payment made in order to exert undue influence upon the performance of an official duty, extortion involves payment in return for something *to which the payor is already legally entitled.* In other words, while the essence of bribery is voluntariness, the essence of extortion is duress. *People v. Dioguardi,* 8 N.Y. 2d 260, 203 N.Y.S. 2d 870, 168 N.E. 2d 683 (1960)."

5. Government witness Vacarello testified that a low bid alone does not insure that a company will be awarded a contract.



Here, Vacarello was not legally entitled to anything; he was merely asked for a voluntary payment to exert influence. While such a request may constitute bribery, it does *not* constitute attempted extortion.

It is also noteworthy that the Government's evidence fails to show that Sica attempted, or aided and abetted an attempt, to obstruct, delay and affect interstate commerce as specifically alleged in the indictment and required in order to prove a violation of the Hobbs Act. *Stirone v. United States, supra*; *United States v. Addonizio, supra.* Under this statute, trade or commerce must be affected by extortion "in any way or degree". 18 U.S.C. §1951 (a). Here assuming "arguendo" that attempted extortion occurred, there is no evidence of such an effect either in fact or potential. There would have been no cancellation or delay in the construction work. Jobs would not have been lost, nor would there have been an alteration in suppliers or the purchase of supplies. The same amount of money would have been circulated in commerce. See: *United States v. Critchley,* 353 F. 2d 358 (3d Cir. 1965).

**III.**

Petitioner Sica alleges that the court of appeals has rendered a decision in conflict with the decision of the Fifth Circuit in *Byrd v. Wainwright,* 428 F.2d 1017 (5th Cir. 1970), by holding that the trial court did not abuse its discretion in denying petitioner Sica's repeated motions for severance.

Rule 14 of the Federal Rules of Criminal Procedure permits a severance, despite the propriety of the original joinder, if needed to avoid prejudice. Events at trial may alter a situation such that severance is necessary in order to preserve a defendant's right to fair trial. A district judge has the power to order a severance under Rule 14, and indeed has a "continuing duty at all stages of the trial to grant a severance if prejudice does appear." *Schaffer v. United States,* 362 U.S. 511, 516, 80 S.Ct. 945, 948 (1960).

At the trial below, Sica suffered prejudice because he was unable to call co-defendant Frank Joseph Rosa as a witness in his defense. Sica moved for a severance for this reason on two occasions during trial; each motion was denied. It is clear that one defendant may not require another to take the stand at a trial in which both are charged since this would be inconsistent with the privilege of a criminal defendant not to be called to the stand at all. *United States v. Housing Foundation of America, Inc.,* 176 F.2d 665, 666 (3d Cir. 1949). Since Rosa was unwilling to forego his Fifth Amendment right, he was unavailable to testify on Sica's behalf at their joint trial.

There is a line of cases which evidence the courts' lack of willingness to sever a joinder of defendants. However, these decisions rest on a skepticism regarding both whether a codefendant would actually be called and whether he would actually testify. In the instant case, no hint of skepticism on either of these questions was present. Counsel for Sica respectfully represented that he would call Rosa if he could. Rosa informed counsel for Sica that he would testify on Sica's behalf in a separate trial, but not at the joint trial of all co-defendants. Furthermore, Rosa was offered to the trial court as an exculpatory witness in favor of Sica. Counsel for Sica explained that Rosa told him in the presence of his (Rosa's) counsel that he could and would provide exculpatory testimony. Counsel for Sica considered this exculpatory testimony to be significant and necessary to his client's defense. He even set forth the specific nature of the testimony as follows:



> "*Mr. Livingston*: It having been represented to me by Mr. Rosa in the presence of his counsel that he could if called exculpate or provide testimony that would tend to exculpate Mr. Sica including but not limited to testimony that Mr. Sica is the father-in-law of Mr. Rosa and Mr. Rosa had a business relationship with Mr. Mannella and on the occasion of July 23, Mr. Sica went along with Mr. Rosa to Mr. Mannella's office and did not participate in any conversation with Mr. Vacarello or Mr. Mannella as has been testified to by Mr. Vacarello. It has been by inference suggested to me that there are other matters that Mr. Rosa would not discuss with me. It appearing that other matters may tend to incriminate him."

In the face of so compelling a need for testimony which goes to the heart of the issues involved, the severance

requested by Sica should have been granted. See: *United States v. Gleason,* 259 F. Supp. 282, 284-285 (S.D.N.Y. 1966); *United States v. Shuford,* 454 F.2d 772 (4th Cir. 1971).

In rejecting Sica's argument, the majority of the court of appeals applied five factors listed in *Byrd v. Wainwright, supra,* 428 F.2d at 1019-1020, which ought to be considered in deciding whether to sever a defendant under these circumstances (see: Appendix E, 64a-67a). They concluded that on balance, even though Sica was unable to call a witness who might have contradicted the only inculpatory testimony against him, the trial judge had not abused his discretion in refusing the severance.

The three dissenters on the court of appeals reasoned that the majority had mistakenly interpreted the record and erroneously interpreted *Byrd v. Wainwright, supra* (see: Appendix E, 69a-77a). Using the *Byrd* analysis, the dissenters reached a different result, believing that the severance motions should have been treated with "greater deference as was done in *Byrd*". The dissenters concluded:

> "It should be most particularly noted that in *Byrd* the opposite result from that favored by the majority in the case at bar was reached, and severance was granted, though the facts favoring severance in *Byrd* were not as strong as in the case at bar." (Appendix E, 77a).

Sica maintains that the *Byrd v. Wainwright* factors adopted by the court of appeals were in fact met. Counsel for Sica clearly set forth co-defendant Rosa's proposed exculpatory testimony and the reason for the



severance. Also, Rosa himself indicated to counsel for Sica that he would testify on Sica's behalf in a separate trial. Thus, it appears that the principal reason for the majority's holding was the concern for "judicial economy" (Appendix E, 66a). Sica vigorously argues that when a conflict exists between an individual's constitutional right to a fair trial and the administrative workings of the judiciary, the former must supersede the latter.

## IV.

Petitioner Sica submits that this Court ought to decide whether a defendant at a joint trial is entitled to a severance after the Government has rested and before a co-defendant presents defense testimony in order that the jury may consider only the Government's evidence against him.

At the trial below, petitioner Sica argued that a severance was necessary because of the prejudice caused by the presentation of co-defendant Mannella's defense after Sica had rested. Sica moved for a severance on this ground and requested that the trial court instruct the jurors that they only could consider the Government's evidence, and not Mannella's, in weighing the case against him. After this motion was denied, counsel for Sica informed the trial court that since Mannella's defense was wholly independent of Sica's case he would not participate in the presentation of Mannella's defense by cross-examination or otherwise. Throughout this presentation, he repeatedly objected, moved that the testimony be stricken and moved for relief from prejudicial joinder under Rule 14 of the Federal Rules of Criminal Procedure. Each objection and motion was overruled by the trial court.

The prejudice to Sica because of the joinder to co-defendant Mannella was painfully obvious throughout the presentation of Mannella's defense. First, during both the opening and closing address to the jury, Mannella's counsel commented upon his client's willingness to give up his Fifth Amendment right and to testify truthfully in his own behalf; such a comment could only serve to unfairly draw attention to and raise suspicions about Sica's silence. Second, the existence of antagonistic defenses was inherently prejudicial to Sica. See: *Moore's Federal Practice,* Vol. 8, § 14.04 (3) at 14-29; *Bruton v. United States,* 391 U.S. 128, 88 S.Ct. 1620 (1968). Third, certain testimony by Mannella himself constituted evidence of criminal conduct not charged in the indictment. Such irrelevant and damaging testimony was bound to have an adverse effect on the jury's consideration of the case against Sica. It would have been inadmissible in a separate trial, but due to the instant joinder it was improperly injected into the case. Fourth, Mannella testified to statements which he made in regard to the incident in question long after its termination. Since these statements were made in the absence and without the knowledge of the accused (Sica), they are inadmissible to prove the guilt of one other than the declarant. *Krulewitch v. United States,* 336 U.S. 440, 69 S.Ct. 716 (1948). The prejudicial effect of the admission of these statements against one other than the declarant and the lower court's failure to caution the jury accordingly would ordinarily require a reversal of a conviction. *Fiswick v. United States,* 144 U.S. 263, 12 S.Ct. 224 (1891). Fifth, Mannella's testimony affirmed that Sica was the "Mr. Sica" with whom Vacarello conversed on July 23, 1974. As noted above, Vacarello could not make an in-court identification of Sica and was not



certain that Sica was the individual who he met. To have Mannella fill this critical gap in the Government's case was extremely prejudicial to Sica. With this particular testimony and all that was introduced as a result of Mannella and Sica being tried together, the jury could have based its conviction of Sica on the case presented by his co-defendant. In view of this obvious prejudice, it is plain that petitioner Sica was denied his constitutional right to a fair trial.

## V.

In the court of appeals, petitioner Sica argued that the trial court erred in refusing to instruct the jury with the standard accomplice charge and its corollary under *Cool v. United States,* 409 U.S. 100, 93 S.Ct. 354 (1972). This argument was rejected, and Sica now contends that the court of appeals' decision is in conflict with an applicable decision of this Court, *Cool v. United States, supra.*

Petitioner Sica contends that co-defendant Mannella must be classified as an accomplice of Sica under the circumstances of the instant matter. Since Mannella testified in his own behalf and presented incriminating evidence as to Sica, Sica is entitled to a jury instruction on the standard accomplice charge. It is submitted that the failure to give this charge as well as its corollary under *Cool v. United States, supra,* was error. *Cool* requires that where accomplice testimony is offered the trial court must instruct the jury that it can either convict or acquit on the basis of accomplice testimony. 409 U.S. 103, n. 4, 93 S.Ct. 356-357, n. 4. Furthermore, Mannella's testimony also presented exculpatory evidence as to Sica, eg., that Mannella only had one meeting with

Vacarello on the morning of July 23, 1974 when Sica and Rosa were present and that the alleged afternoon meeting on that date never occurred. By virtue of *Cool,* exculpatory testimony of an accomplice need only be proven by a fair preponderance of the evidence in order to raise a reasonable doubt. 409 U.S. 101-105, 93 S.Ct. 354-357.

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## CONCLUSION

For the reasons discussed above, petitioner Sica requests a writ of certiorari issue to review the judgment of the United States of Appeals for the Third Circuit.

Respectfully submitted,

THOMAS A. LIVINGSTON
DENNIS J. CLARK

Attorneys for Petitioner

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## CERTIFICATE OF SERVICE

Petitioner, Joseph Sica, by his attorneys, Thomas A. Livingston, Esq., and Dennis J. Clark, Esq., hereby certify that the within Petition for Writ of Certiorari has been forwarded by mail for filing to the Clerk of the Supreme Court of the United States in Washington, D.C., and that a true and correct copy of said Petition has been forwarded by mail to the Office of the Solicitor General of the United States, Department of Justice, Washington, D.C.

THOMAS A. LIVINGSTON, ESQ.
DENNIS J. CLARK, ESQ.

Attorneys for Petitioner

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## APPENDIX A.

**Memorandum and Order Dated May 19, 1975.**

IN THE UNITED STATES DISTRICT COURT
For the Western District of Pennsylvania

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UNITED STATES OF AMERICA,

vs.

FRANK JOSEPH ROSA, a/k/a "JOE", Joseph SICA and VINCENT MANNELLA.

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Criminal Action No. 75-80.

---

MEMORANDUM and ORDER.

BARRON P. McCUNE, *District Judge*
May 19, 1975.

The defendants have been indicted for alleged conspiracy to violate the Hobbs Act, Title 18, § 1951 (Interference with commerce by threats or violence). Essentially the government contends that the defendants conspired to and attempted to obstruct interstate commerce by attempting to extort $10,000.00 from Joseph Vacarello, Jr.

Several pretrial motions have been filed. All defendants have joined in all motions.

The first is a motion to dismiss because so-called "Strike Force" attorneys presented the case to the Grand Jury pursuant to appointments which were invalid for lack of specificity under 28 U.S.C., § 515(a) and therefore under Rule of Criminal Procedure 6(d) unauthorized persons were in the Grand Jury Room. The

defendants also seek an evidentiary hearing of a discovery nature to determine the circumstances under which the appointments were made, the directives of the Attorney General, if any exist, in addition to the letters of appointment; who the attorneys were who appeared before the Grand Jury and all of the inter-office material which the Attorney General has pertaining to the authority of the government attorneys.

The second motion asks the severance of the trial of Mannella from the others because of pretrial publicity which referred to Rosa and Sica as figures connected with organized crime. Three newspaper articles were attached to the motion which refer to Rosa and Sica as members of the organized crime family of John Sebastian La Rocca.

Defendant Rosa moves for a severance for purposes of trial as well because of the danger of the admission of the hearsay statements of alleged co-conspirators during the trial.

At oral argument defendant Rosa also moved for a severance because of the fear of [*Bruton v. United States,* 391 U.S. 123 (1968)] problems. He contends that Mannella's Grand Jury testimony has been given Mannella and he fears that it contains admissions or confessions which, if used, will compromise the other defendants. He has not seen Mannella's testimony but believes the problem to exist.

At oral argument John W. Murtagh, Jr., and James E. Roark appeared representing the government and Mr. Murtagh stated that he had presented the case to the Grand Jury. His letter of appointment was furnished,



dated October 2, 1973, executed by Henry E. Petersen, Assistant Attorney General.

The letter has been examined. It is fairly general in tenor and is not unlike the appointment of other so-called Strike Force attorneys which we have seen.

We recently said in ruling on a similar motion in the case of U.S. v. Nemetz, et al., Cr. No. 75-32, that so much had already been written on this subject that it was unnecessary to add to the material.

Defendants argue that the specificity requirements of 28 U.S.C. § 515(a)[1] render the appointments void because the letter of appointment is too general. This depends on whether the reader concludes that Congress intended to limit the Attorney General in obtaining help or to assist the Attorney General in getting help when needed. The great weight of authority adopts the view that Congress intended to permit the Attorney General to get all the help he required and he was therefore authorized to specially appoint attorneys and to specifically direct them to function in a broad field. See *U.S. v. Brown,* Cr. No. 74-867 (S.D. N.Y., filed February 24, 1975), 16 CrL 2504, March 12, 1975.

The last opinion on this subject available to us in an opinion of April 22, 1975, in the District Court for the District of Rhode Island, Misc. No. 75-86, captioned:

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1. 28 U.S.C. 515(a) provides, *inter alia:* "The Attorney General or any other officer of the Department of Justice, or any attorney specially appointed by the Attorney General under law, may, when specifically directed by the Attorney General, conduct any kind of legal proceeding . . ."

"In Re: Grand Jury Subpoenas addressed to Raymond L. S. Patriarca et al." We agree with what was said there.

We find it unnecessary to furnish discovery to defendants concerning the Attorney General's directives or his interoffice practices or what he may have told Murtagh respecting his authority.

The motion to dismiss because of the alleged violation of Rule 6(d) of the Criminal Rules will be dismissed.

With respect to the second motion that we sever Mannella's trial because of pretrial publicity, we believe it wise to await *voir dire* to determine whether the publicity makes the granting of this motion proper so it will be denied as well.

The motion of Rosa that we sever his case for trial because of the danger of the admission of the hearsay statements of alleged co-conspirators during the trial will be denied also.

This leaves pending the motion that the trials be severed because of the possibility of *Bruton* problems because of what Mannella may have said to the Grand Jury. Government counsel states that there are no *Bruton* problems but defense counsel suspect they exist. We have no way of knowing the answer to this short of looking at the transcript of Mannella's testimony or of ordering it displayed to all defense counsel. The latter course is unwise because Mannella may not wish to reveal the testimony.

We are willing to examine that testimony *in camera* provided all parties, including the government, consent. However, we do not require this action. We believe it would be just as wise to proceed to trial believing that



government counsel will not create a problem so well warned of in advance of trial.

Therefore, the motion to sever because of a possible *Bruton* problem is denied. However, it will be reconsidered in the event defendants and the government present the Mannella transcript within 10 days from the date hereof along with a renewed motion.

The trial of this case will begin at 10:00 A.M., June 23, 1975, in Court Room No. 10.

It is so ordered.

BARRON P. McCUNE,
*United States District Judge.*

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## APPENDIX B.

**Memorandum and Order Dated October 29, 1975.**

IN THE UNITED STATES DISTRICT COURT
For the Western District of Pennsylvania

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UNITED STATES OF AMERICA,
vs.
FRANK JOSEPH ROSA, a/k/a "JOE", Joseph SICA and VINCENT MANNELLA.

---

Criminal Action No. 75-80.

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MEMORANDUM and ORDER.

BARRON P. McCUNE, *District Judge.*
October 29, 1975.

In a two count indictment the United States charged defendants Frank Joseph Rosa, Joseph Sica and Vincent Mannella with violations of the federal conspiracy statute, 18 U.S.C. § 371 (Count 1) and the Hobbs Act, 18 U.S.C. § 1951 (Count 2). The conspiracy count was dismissed on motion of defendants during presentation of the government's case. Trial proceeded under the charge set forth in the second count of the indictment.

At trial, the government's chief witness was Joseph Vacarello, Jr., who was part owner of a family business which did landscape contracting work under the name Penn Landscape and Cement Work. Vacarello testified that on the morning of July 23, 1974, he received a phone call at his place of business from the office of Vincent



Mannella requesting that he come up to Mannella's office, which was located nearby. Mannella, who was a business acquaintance of Vacarella, was the founder and president of Mannella Engineers, a private consulting engineering firm.

Vacarello testified that pursuant to the phone call, he went to Mannella's office where Mannella introduced him to defendants Rosa and Sica, who presented themselves as representatives of unnamed members of the Monroeville Borough Council. At the meeting Vacarello was asked if he had submitted a bid on behalf of Penn Landscape for the construction of a park in Monroeville Borough. When he acknowledged that he had one of the defendants told him: "We would like to see you get the job but we would like a donation." Vacarello was not alarmed since this was not an unusual demand in his line of work. He was also told that he had a problem but he was not made aware of just what that problem was at the morning meeting. He was merely told that Mannella would contact him later that day.

According to Vacarella's testimony, he received a message from his answering service during the afternoon of the same day that Mannella had called. He returned the call whereupon Mannella requested him to come to his office again. Vacarello testified that he did so.

Upon his arrival, and while only he and Mannella were present, Vacarello testified that Mannella told him that the "donation" was to be $10.000.00. His testimony was that he was also told that if he refused to make the donation, he would not get the Overlook Park project on which he was low bidder, or any other work from the Borough of Monroeville. Vacarello also testified that he became aware of his "problem" at this afternoon meet-

ing with Mannella when Mannella showed him a copy of the minutes of the Borough's Recreation Committee which indicated that he would not be awarded the Overlook Park project.

The jury convicted all three defendants.

Now before the court are post trial motions filed on behalf of defendants Rosa and Sica. Those motions are:

1. Motions in arrest of judgment under Rule 34, Fed. R. Crim. P., in support of which defendants advance two principal arguments, to wit,

(a) that Count II of the indictment fails to charge an indictable offense; and

(b) that the offense of which defendants stand convicted is not the offense charged in the indictment;

2. Motions for judgment of acquittal under Rule 29, Fed. R. Crim. P., in support of which defendants argue that the evidence is insufficient to sustain the convictions as a matter of law; and

3. In the alternative, motions for new trial under Rule 33 alleging trial errors, including, *inter alia:*

(a) denial of defendants' repeated motions for severance under Rule 14, Fed. R. Crim. P., for relief from prejudicial joinder;

(b) the failure of the Court to charge the jury as requested by defendants in certain of their points for charge;

(c) errors within the Court's charge;

(d) error in admission of certain evidence; and



(e) failure to declare a mistrial after improper closing argument by the prosecution.

After the careful consideration of the trial record, the briefs of counsel and the points raised at oral argument on the motions, it is the opinion of this Court that all motions should be denied.

## I.

### The Indictment

Count II of the indictment charges that defendants

> "did unlawfully and willfully attempt to obstruct, delay and affect interstate commerce . . . by extortion as the term 'extortion' is defined in and by Section 1951, Title 18, United States Code; that is to say the said defendants did wrongfully and unlawfully attempt to obtain property of the value of $10,000 in the form of money from Joseph Vacarello, Jr. as agent and owner of the Penn Landscape and Cement Work with his consent induced by wrongful use of fear in that said defendants did threaten the said Penn Landscape and Cement Work and Joseph Vacarello, Jr., with loss of the 'Overlook Park' project and other contracts unless and until . . . Joseph Vacarello, Jr., paid the defendants the said amount of money."

For purposes of the motions now before the Court, three aspects of the indictment bear emphasis. First, the indictment charges defendants with an unlawful attempt to obstruct commerce "by extortion as the term 'extortion' is defined in and by Section 1951," which is as follows:

> "The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence or fear, or under color of official right."

18 U.S.C. § 1951(b)(2). Secondly, when the indictment charges the wrongful use of fear, it is fear of economic loss, (see *United States v. Varlack,* 225 F.2d 665, 668 (2d Cir. 1955)), *i.e.,* the loss of contracts, as opposed to fear of physical force or violence against either the intended victim or his property. Finally, it should be remembered that the indictment does not charge that commerce was affected by extortion; it does not charge that the extortion was completed or that commerce was affected in any way. It does not charge that money was actually obtained from the intended victim. What is charged is that defendants *attempted* to obtain money by instilling in the victim fear of economic loss if he refused to accede to the extortionate demand.

With this background, we now consider defendants' contentions *seriatim.*

## II.

### The Hobbs Act

18 U.S.C. § 1951, the so-called Hobbs Act, provides:

> "(a) Whoever in any way or degree obstructs, delays or affects commerce or the movement of any article or commodity in commerce by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose or purpose to do anything in violation of this section [shall be guilty of an offense.]"



It is defendants' contention that while the above-quoted section clearly proscribes any attempt to obstruct, delay or affect commerce (as commerce is defined in the Act, § 1951(b)(3)) by extortion (as extortion is defined in the Act, § 1951 (b)(2) *supra*), the language of the Act does not make criminal an attempt to obstruct, delay or affect commerce by *attempted* extortion when there is no threat or use of physical violence and the indictment charges extortion of the type defined in the Act.[1] Stated otherwise, defendants argue that where, as here, the fear of economic loss is the only force or fear charged in the indictment, then in order for an offense to be made out, the attempted extortion must have been completed, *i.e.,* the victim must have acceded to the unlawful demand.

### A. *Is 'Attempted Extortion' a Hobbs Act Offense?*

Since there is no federal common law of crimes, federal criminal law is purely statutory. *United States v. Berrigan,* 482 F.2d 171, 185 (3rd Cir. 1973). Therefore, an attempt to commit a federal offense is itself an offense only when the section defining the offense specifically includes an attempt within its proscription. *United States v. Padilla,* 374 F.2d 782, 787, n.7., (2nd Cir. 1967); *United States v. Joe,* 452 F.2d 653, 654 (10th Cir. 1972); see also Rule 31(c), Fed. R. Crim. P.

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1. Defendants distinguish between extortion as the term extortion is defined by § 1951(b)(2) and "what might be loosely referred to as another extortion provision," that is, committing or threatening physical violence to person or property in furtherance of a plan to do anything in violation of § 1951(a)." See Def. Rosa's Br., at 3.

Defendants urge that the only crimes established by § 1951(a) are:

1. The obstruction, delay or affectation of commerce or the movement of any article in commerce by

(a) robbery, or

(b) extortion;

2. The attempt "so to do;"

3. The conspiracy "so to do;" and

4. Committing or threatening physical violence to any person or property in furtherance of a plan to do anything in violation of § 1951.

They argue that the wording of the Act precludes an interpretation which would make it an offense to attempt to obstruct, delay or affect commerce by *attempted* extortion.

The premise for this claim is that the phrase *"attempts or conspires so to do"* as used in the Act refers to interference with commerce and not to the word, extortion. The identical argument was made in *United States v. Tropiano,* 418 F.2d 1069, 1082 (2d Cir. 1969) where the appellants argued that "[T]he Hobbs Act requires proof of completed extortion and if construed to cover attempted extortion, is constitutionally void for vagueness." The Second Circuit rejected this argument:

> "The textual analysis of the statute would clearly embrace an attempt or conspiracy to interfere with commerce by extortion even though the attempt or conspiracy failed because the extortion was uncompleted. *United States v. Pranno,* 385 F.2d 387, 389-390 (7th Cir. 1967), cert denied, 390 U.S. 944 (1968)."

418 F.2d at 1083.



Defendants have submitted a letter of three language experts which would support their grammatical argument. (See Exhibit "B" to Defendant Rosa's Brief). However, after consideration of the Act's legislative history, its construction by the judiciary in previous cases and the arguments presented here, we are convinced that it was clearly the intent of Congress to punish attempted extortion.

1. *Legislative History of § 1951.*

The present § 1951 is derived from the "Anti-Racketeering Act of 1934." *United States v. Varlack, supra,* at 671. Section 2 of the 1934 Act, 48 Stat. 979-980, provided:

> "Sec. 2. Any person who, in connection with or in relation to any act in any way or in any degree affecting trade or commerce or any article or commodity moving or about to move in trade or commerce—
>
> (a) obtains or *attempts to obtain,* by the use of or attempt to use or threat to use force, violence or coercion, the payment of money or other valuable considerations . . . or
>
> (b) obtains the property of another, with this consent, induced by wrongful use of force or fear, or under color of official right; or
>
> * * *
>
> (d) conspires or acts concertedly . . . to commit any of the foregoing acts; shall upon conviction thereof be guilty of a felony." (Emphasis added).

After the "restrictive"[2] decision of the Supreme Court in *United States v. Local 807*, 315 U.S. 521 (1942), the statute was amended in 1946 to provide:

> "Sec. 2. Whoever in any way or degree obstructs, delays, or affects commerce, or the movement of any article or commodity in commerce, by robbery or extortion shall be guilty of a felony.
>
> * * *
>
> "Sec. 4. Whoever *attempts or participates in an attempt to do anything in violation of section 2* shall be guilty of a felony." (Emphasis added).

60 Stat. 420.

In 1948 the Act was codified and assumed its present form, 62 Stat. 793 c. 645.

> "Nothing in the legislative history of either the 1946 amendment or the 1948 codification indicates a congressional purpose to effect a change in the 1934 Act in so far as it was aimed at conspiracies to extort or rob or attempts to extort or rob which obstruct, delay or affect foreign or interstate commerce. Moreover, the reviser's notes to Title 18, § 1951 indicate quite clearly that the 'changes in phraseology and arrangement' were designed solely to effect consolidation,"

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2. In *United States v. Local 807, supra,* the Court declared that certain terrorist activities of various Teamsters Locals were excluded from the scope of the 1934 Act. Congress, evidently believing that the exemption given labor under the 1934 Act was too broad responded with the 1946 amendment which was designed to deter such labor practices. See *United States v. Varlack, supra,* at 669; *United States v. Callanan,* 364 U.S. 587, 590-591 (1961).



*United States v. Varlack, supra,* at 672.[3]

We believe that it is clear from § 1951's legislative history that Congress did not intend to eliminate an attempt to extort from the Act's prohibition. Defendants, citing numerous sections of Title 18, contend that Congress is aware of how to make an attempt a criminal offense which, they argue, was not done here. However, we believe that the present case is but another example of how draftsmen and revisers can create problems as to the meaning of a statute without busy legislators having any idea of what is occurring. See *United States v. Padilla, supra,* at 788 (J. Friendly, concurring).

Defendants seek to invoke the maxim that penal statutes should be strictly construed. However, as stated in *United States v. Padilla, supra,* at 787:

> "But that canon 'is not an inexorable command to override common sense and evident statutory purpose,' *United States v. Brown,* 333 U.S. 18, 25 and does not 'require that the Act be given the "narrowest meaning." It is sufficient if the words are given

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3. The elimination of separate sections for conspiracies and attempts (§§ 3 and 4 of the 1946 Act) and their consolidation with section 2 to form § 1951(a) of the present Act was explained in H.R. 304 (80th Cong. 1st Sess.) (1947), at A131:

> "The words 'attempts or conspires so to do' were substituted for sections 3 and 4 of the 1946 Act omitting as unnecessary the words 'participates in an attempt' and the words 'or acts in concert with another or with others' in view of Section 2 of the Title which makes any person who participates in an unlawful enterprise or aids or assists the principal offender, or does anything toward the accomplishment of the crime, a principal himself."

See also *Callanan v. United States,* 364 U.S. 587 (1961).

> their fair meaning in accordance with the evident intent of Congress.' " [*United States v. Cook,*] 384 U.S. 257, 262-263 (1966).

While we agree with the observation of Mr. Justice Stewart, in his dissent in *Callanan v. United States, supra,* at 598 that "the relevant section of the Act (§ 1951) . . . is not a model of precise verbal structure," it is evident from the legislative history that it was the intent of Congress to forbid attempted extortion.

2. *Judicial Interpretation of the Hobbs Act.*

As previously mentioned the same argument presented by these defendants was made in *United States v. Tropiano, supra,* the Court, finding that the text of the statute "would clearly embrace an attempt . . . to interfere with commerce by extortion even though the attempt failed because the extortion was uncompleted."

Furthermore, in the recent case of *United States v. Starks,* 515 F.2d 112 (3rd Cir. 1975) the Third Circuit Court of Appeals stated:

> "The Hobbs Act proscribes a number of separate offenses: (1) robbery; (2) extortion; (3) attempted robbery or extortion; and (4) conspiracy to commit robbery or extortion."

515 F.2d at 116. See also *United States v. Jacobs,* 451 F.2d 530, 534 (5th Cir. 1971) *cert. denied,* 405 U.S. 955 (1972).

Defendants, while conceding that the statement in *Starks,* if deemed controlling is fatal to their argument, contend that the above quoted statement is mere dicta since in *Starks,* the attempted extortion had reached fruition. Furthermore, defendants contend that neither



the Fifth Circuit in *Jacobs* nor the Third Circuit in *Starks* has truly analyzed the Hobbs Act for the number of crimes created since neither case proceeds to the substantive offense of committing or threatening physical violence to any person or property in furtherance of a plan to violate the Act. See Def.'s br. at 8.

Furthermore, defendants contend that the case at bar is distinguishable from cases cited by the government for the proposition that attempted extortion is a substantive offense. See *e.g., Hulahan v. United States,* 214 F.2d 441, 445 (8th Cir. 1954), *cert. denied,* 348 U.S. 865 (1954); *Anderson v. United States,* 262 F.2d 764, 769-770 (8th Cir. 1959), *cert. denied,* 360 U.S. 929 (1959); *United States v. Green,* 246 F.2d 155 (7th Cir. 1957), *cert. denied,* 355 U.S. 871 (1957); *United States v. Mitchell,* 463 F.2d 187 (8th Cir. 1972); *United States v. Shackelford,* 494 F.2d 67 (9th Cir. 1974), *cert. denied,* 417 U.S. 934 (1974); *United States v. Merry,* 514 F.2d 399 (8th Cir. 1975), and *United States v. Iozzi,* 420 F.2d 512 (4th Cir. 1970), *cert. denied,* 402 U.S. 943 (1971).

Defendants argue that when the courts in the above cited cases refer to a prohibition against attempted extortion, they are not referring to extortion as defined by the Act, but rather to extortion within the substantive offense in the Act, to wit: "whoever . . . commits or threatens physical violence to any person or property . . .," see n.1 *supra.* Defendants argue that since the threat of physical violence is extortion within the Act, the substantive crime is committed by threatening physical violence. Defendants argue that the same is not true in cases of extortion as "defined by the Act" which they argue requires that the property be obtained in order to make out a substantive offense.

We find defendants' argument unpersuasive and hold that the prohibition against attempted extortion applies to cases where extortion "as defined by the Act" is charged. In our view, to adopt defendants' technical argument would ignore the Congressional purpose discerned from the legislative history of the Act.

B. *Were Defendants Convicted of the Crime Charged by the Indictment?*

As a corollary to their principal argument that the Hobbs Act cannot be interpreted to proscribe attempted extortion, defendants argue that the crime of which they were convicted is not the crime charged in the indictment. The assertion is based on the language of the indictment which charges defendants with an attempt to obstruct, delay or affect commerce by extortion, as the term "extortion is defined in and by § 1951." Defendants argue that under the definition of extortion contained in § 1951 (b)(2), the attempt to extort must have been completed. Having rejected defendants' argument that attempted extortion is not a Hobb's Act crime, *a fortiori,* we find no variance between the charge in the indictment and the charge of which defendants were convicted.

In short, we believe that defendants were tried only on charges set forth in the indictment as required by *Ex parte Bain,* 121 U.S. 1 (1887) and *Stirone v. United States,* 361 U.S. 212 (1960).

III.

JOINDER

Among the arguments raised by defendants in support of their respective motions for new trial, only one



requires extensive discussion, *i.e.,* whether it was error to deny defendants' repeated[4] motions to sever for relief from prejudicial joinder. We conclude that it was not.

Defendants were properly joined in a single indictment since they were alleged to have participated in the same acts or transactions. *United States v. Starks, supra,* at 116. The question is whether they were properly tried together.

Primarily, for reasons of economy of time in judicial administration, the general rule has evolved that persons jointly indicted should be tried together. This rule has particular strength where, as here, one crime may be proved against two or more defendants on a single set of facts or the same evidence, *United States v. Shuford,* 454 F.2d 772, 775-776 (4th Cir. 1971), and a defendant is not entitled to a separate trial merely because it might offer him a better chance of acquittal. See *United States v. Wilson,* 434 F.2d 494, 501 (D.C. Cir. 1970); 8 Moore's Federal Practice, § 14.04[1] at 14-14.2—14-15. But notwithstanding the need for efficiency in judicial administration, a joint trial is inappropriate if it sacrifices a defendant's right to a fundamentally fair trial. *United States v. Shuford, supra,* at 776; *United States v. Echeles,* 352 F.2d 892, 896 (7th Cir. 1965).

Whether or not a severance is to be granted is within the sound discretion of the trial court. *Opper v. United States,* 348 U.S. 84 (1954), *United States v. Stitt,* 380 F.

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4. Defendants requested severance prior to trial, during the direct examination of government's principal witness twice (Tr. 144), during redirect examination of government's principal witness (Tr. 247, 264). at the conclusion of the government's case in chief (Tr. 277) and on four other occasions subsequent to having rested (Tr. 322, 323, 349, 363).

Supp. 1172, 1176 (W.D. Pa. 1974), and involves a balancing[5] of the interests of the public in avoiding a multiplicity of litigation and the interest of the defendants in obtaining a fair trial. 8 Moore's Federal Practice, 14.02[1], at 14-3. Furthermore, in cases of prejudicial joinder, defendant has the difficult burden of demonstrating that he is sufficiently prejudiced by the joinder to warrant severance. As we have said, the determination of the elusive criterion of prejudice rests within the judicial discretion at the trial level, see 8 Moore's Federal Practice, § 14.02[1], and requires a case-by-case determination. *United States v. Echeles, supra,* at 897.

In their post-trial motions defendants argue that the Court abused its discretion in denying their motions to sever. First, defendant Rosa contends that a joint trial allowed prejudicial statements to be elicited by other counsel's examination of the principal government witness:

> "The prejudicial nature of joinder to this defendant is evident from the standpoint of the entire trial. For example, the limited cross-examination of the government witness conducted by counsel for Rosa was expanded by counsel for other defendants to the extent that the witness was finally able, on re-direct examination by the government, to state that he had prepared a written memorandum of the events occurring on July 23, 1974, for the reason that if he disappeared he would want someone to know what had occurred that day. All evidence of

5. In *Byrd v. Wainwright,* 428 F.2d 1017 (5th Cir. 1970), the Court offers guidelines for evaluating motions for severance based on a desire to offer exculpatory testimony of a co-defendant.



> lack of fear had been explored and established by counsel for Rosa." (Def's Br. at 16-17).

Second, defendants argue that they were prejudiced by the comments of counsel for co-defendant Mannella to the effect that Mannella would take the stand and testify forthrightly and honestly. In their view, that statement necessarily alluded to the fact that both Rosa and Sica chose to rely on the presumption of innocence and elected not to testify.

Third, Rosa contends that his joint trial with defendants Mannella and Sica was inherently prejudicial because of antagonistic defenses.

Fourth, both defendants contend that they were denied a fair trial (a), by the Court's refusal to allow the cases against them to go to the jury after the government rested and both Rosa and Sica had rested, but before Mannella presented his defense and (b), by the Court's refusal to charge the jury, as requested, that they could not consider evidence which was presented during Mannella's defense in connection with the charges against Rosa and Sica. Defendants argue that these allegedly prejudicial errors could have been avoided by separate trials.

Fifth, defendant Sica contends that a severance was required when his counsel advised the court that co-defendant Rosa would provide exculpatory testimony on Sica's behalf if either Rosa or Sica were granted a severance, but that he refused to testify and relinquish his right to remain silent during the joint trial.

Finally, Sica contends that his constitutional rights to a fair trial, effective assistance of counsel, due process and compulsory process to secure witnesses in his

behalf were abrogated by the court's denial of his motions to sever.

We will deal with each of these arguments *seriatim:*

Defendant Rosa's first contention is that cross-examination of Vacarello by counsel for co-defendant Mannella opened the door for the government, on redirect, to elicit answers which would not have come out at a separate trial, and which were prejudicial to Rosa.[6] We find no merit in this argument. Whether or not Vacarello's statement that he prepared a written memo of the events which transpired on July 23, 1974, (the date of the meeting) so that in the event "[I] would end up missing I would have wanted that to be found . . ."[7] would have come out at a separate trial is purely a matter of speculation. But even assuming that it would not have, its admission was not so prejudicial as to warrant a severance. The jury was instructed that defendants were not charged with any physical force or violence. Furthermore, the mere fact that a defendant would have a better chance of acquittal in a separate trial is immaterial. *United States v. Wilson, supra.* The test is whether "for each of the defendants to see the face of Justice they must be tried separately." *DeLuna v. United States,* 308 F.2d 140, 155 (5th Cir. 1962). In our view, the fact that the jury was permitted to consider all of the evidence against all of the defendants was entirely proper with the cautionary instruction that each of the defendants was to be separately considered.[8]

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6. See Transcript, 247-248.
7. Tr. 242-243.
8. Tr. 389.



Defendants cite *DeLuna v. United States, supra,* for the proposition that comments by counsel for co-defendant Mannella to the effect that Mannella would testify forthrightly and honestly necessarily prejudiced Rosa and Sica who elected to remain silent as was their right, see *United States v. Housing Foundation,* 176 F.2d 665 (3rd Cir. 1949). In the *DeLuna case,* DeLuna and his cousin Gomez were charged jointly in a two-count indictment with receiving and facilitating the transportation and concealment of a narcotic drug and with purchasing and acquiring a narcotic drug. Like defendants here, both Gomez and DeLuna had their own attorneys and each attorney defended his own client as he saw fit without regard to the interest of the other defendants. At the trial, after Gomez's pretrial motion for severance had been denied, DeLuna did not testify. Gomez, however, did testify and blamed everything on DeLuna. According to Gomez he was an "innocent victim of circumstances."

> "[H]is only connection with the narcotics was when he and DeLuna were riding in Gomez's automobile; DeLuna saw the police coming, tossed a package (the narcotics) to him and told him to throw it out the window. The police saw Gomez throw the package."

308 F.2d, at 141-142.

In closing, counsel for Gomez made repeated comments on DeLuna's failure to testify which were strenuously objected to by counsel for DeLuna. Gomez was acquitted and DeLuna convicted. In reversing DeLuna's conviction the Court of Appeals for the Fifth Circuit held that a defendant's constitutionally guaranteed right to remain silent, free from prejudicial comment, applies

to statements by a co-defendant's attorney as well as statements by the prosecution or the court. Furthermore, the court felt that instructions by the court that no inference of guilt could be drawn from a defendant's silence were inadequate to neutralize the effect of those comments:

> "But considering the head on collision between the two defendants, the repetition of the comments, and the extended colloquy over the comments between the trial judge and the lawyers, the imputation of guilt to DeLuna was magnified to such an extent that it seems unrealistic to think any instruction to the jury could undo the prejudicial effects of the reference to DeLuna's silence."

308 F.2d at 154. Therefore, the court held that if an attorney's duty to his client requires him to draw the jury's attention to a possible inference of guilt from a co-defendant's silence, the trial judge must order the defendants tried separately to avoid putting "Justice to the task of simultaneously facing in opposite directions." 308 F.2d at 143.

In our opinion *DeLuna* is not applicable to this case since there was no effort by counsel for Mannella to draw the jury's attention to a possible inference of guilt from the failure of either Rosa or Sica to testify. While *DeLuna* clearly stands for the proposition that counsel for Mannella could have done so,[9] the fact is that he did

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9. Judge Bell, in a concurring opinion, argues that counsel should be limited in his comments to statements of the type made by counsel for Mannella here but should not be permitted to go so far as to infer a co-defendant's guilt from his silence. See 8 Moore's Federal Practice, § 14.04[3], at 14-40—14-48.



not. Therefore, the statements complained of are, in the words of *United States v. Shuford, supra,* "an oblique reference to defendant's failure to take the stand." 454 F.2d at 779. In *Shuford,* the court specifically rejected the argument of defendant that a statement of co-defendant's counsel, to wit: "Mr. Shuford answered the question in a direct, forthright manner without evasion" 454 F.2d at 779, was prejudicial to defendant. Because defendants here, like those in *Shuford* did not attempt to blame each other, we conclude that defendants suffered no prejudice from the comments complained of.

Furthermore, we agree with Judge Bell's concurring opinion in *DeLuna* where he says that if severance in advance of trial were required where there is a representation to the court that one co-defendant does not expect to take the stand while another or others do expect to testify,

> "This would eleiminate joint trials, or vest in the defendant the right to a mistrial during final arguments, or, in the alternative, build in reversible error, all in the discretion of the defendants. The law contemplates no such end."

308 F.2d at 156.

Finally, in the court's charge, the jury was instructed:

> "The law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence and a defendant need not testify in his own defense and you may not draw any adverse inference from his failure to do so, that is, the defendant need not testify in his own defense

and I repeat that you may not draw any adverse inference against him from his failure to testify."[10]

Nor do we find that defendants' claim that joint trial was inherently prejudicial because of the antagonistic defenses of co-defendants has any merit.

> "If all that was necessary to avoid joint trial was a showing of prejudice, there would be few, if any, multi-defendant trials. This is because the very fact of joinder is prejudicial to one or more of the defendants. Thus, the following inherently prejudicial factors do not give rise to severance: that another defendant is charged with more serious offenses, that defenses of co-defendants are generally antagonistic . . ."

8 Moore's Federal Practice, § 14.04[1], at 14-14.1. However, even were we to assume that antagonistic defenses required a severance, see *e.g., DeLuna v. United States, supra,* the defenses in this case were not "antagonistic." See *United States v. Baggett,* 455 F.2d 476 (5th Cir. 1972). We have carefully reviewed the record and fully agree with the government's contention that the net effect of Mannella's testimony was to exculpate all three defendants.

In contrast to *DeLuna,* where the defenses were mutually exclusive, none of the defendants here sought to exculpate himself at a co-defendant's expense. See *Fields v. United States,* 370 F.2d 836 (4th Cir. 1967). We believe that the statement of the court in *United States v. Baggett, supra,* at 748, is also applicable here.

> "All three defendants were charged as to the same events . . . It would not be reasonable to require separate trials merely because the quality of the defense of each defendant might vary, if the defenses do not conflict."

10. Tr. 368.



In answer to defendants' fourth argument we believe that both (1), the request to have the cases against Rosa and Sica submitted to the jury prior to Mannella's defense and (2), the request to instruct the jury that they could not consider the evidence presented in Mannella's defense in connection with the charges against Rosa and Sica were properly denied. In effect, the granting of either request would have amounted to a severance. The indictment in our view charged a joint attempt against all three defendants. It was, therefore, proper that the jury be permitted to consider all the evidence against each of the defendants. The fact that certain portions of Mannella's testimony may have corroborated the government's evidence is immaterial, *United States v. Wilson, supra,* at 501-502, especially in view of the fact that the net effect of his testimony in no way prejudiced the other defendants. The court also instructed the jury that "you should consider each of these defendants separately."[11] The trial strategy employed by counsel for Rosa and Sica whereby neither counsel participated in any cross-examination of defendant Mannella was just that, a trial strategy, and the defendants were not denied an opportunity to do so.

Finally, we reject Sica's argument that a severance was necessary when his counsel advised the court that Rosa would testify on Sica's behalf if a severance were granted. Sica raised his contention that Rosa had testimony exculpatory as to Sica, which Rosa would be will-

11. 389—Tr.

ing to testify to in a separate trial, after the United States had rested. The United States submits that raising the issue, after the government had rested its case in chief was untimely in view of the fact that Rosa was Sica's son-in-law and the five month interval between indictment and trial. However, since there is no evidence that Rosa's willingness to testify at a separate trial became known to Sica prior to that time, we believe it would be improper to base our ruling on that ground since the court has a continuing duty at all stages of the trial to grant a severance if prejudice should appear. *Schaffer v. United States,* 362 U.S. 511 (1960).

In support of his argument, defendant cites *United States v. Gleason,* 259 F. Supp. 282 (S.D. N.Y. 1966), *United States v. Shuford,* 454 F.2d 772 (4th Cir. 1971) and *United States v. Echeles,* 352 F.2d 892 (7th Cir. 1965). In *Gleason,* after a pretrial hearing the court granted severance in an income tax evasion case when the moving defendant made a showing that he needed the evidence of a co-defendant to establish his defense of lack of guilty knowledge. In *Echeles,* the court reversed the conviction of an attorney for suborning perjury and impeding the administration of justice when it found that denial of defendant's motion for severance made him unable to call his co-defendant to the stand for the purpose of getting exculpatory statements into evidence which the co-defendant had made in open court:

> "At this juncture, we hold merely that, having knowledge of Arrington's record testimony protesting Echeles' innocence, and considering the obvious importance of such testimony to *Echeles,* it is error to deny the motion for a separate trial."



352 F.2d at 898. In *Shuford,* the Court of Appeals for the Fourth Circuit held it was error to deny the appellant's motion for severance where "co-defendant had indicated to the trial judge that he would testify if granted a severance and had indicated the precise contents of the expected testimony and its importance."

Thus, in all three cases the defendant presented the trial court with strong reasons demonstrating his need for the testimony of a co-defendant.

In this case, on the other hand, defendant Sica merely represented that Rosa would testify in a manner exculpating Sica if either were severed. In *United States v. Kahn,* 381 F.2d 824, 841 (7th Cir. 1967) the court stated:

> "The unsupported possibility that such testimony might be forthcoming does not make the denial of a motion for severance erroneous."

Furthermore, the cases are consistent in their holding that a defendant must make a showing that the testimony would be exculpatory in effect. See, *e.g., Smith v. United States,* 385 F.2d 34, 38 (5th Cir. 1967), *Byrd v. Wainwright,* 428 F.2d 1017, 1020 (5th Cir. 1970), *United States v. Kaufman,* 291 F. Supp. 451 (S.D. N.Y. 1968). That showing was not made here.

## IV.

### Sufficiency of the Evidence

In passing on the sufficiency of the evidence to support a verdict of guilty in a criminal case, the court must view the evidence and reasonable inferences that may be drawn therefrom in the light most favorable to the prosecution and determine as a question of law whether

there is substantial evidence, either direct or circumstantial, to support the verdict. *Glasser v. United States,* 315 U.S. 60, 80 (1942); *United States v. McClain,* 469 F.2d 68, 69 (3rd Cir. 1972).

In the charge to the jury the court stated that

> "In order to convict Rosa of the charge of attempted extortion you must find beyond a reasonable doubt that:
>
> A. He intentionally went to Mannella's office to participate with Mannella in a plan to obtain money from Vacarello by the use of threats, specifically, the threat to deprive Vacarello of the award of the Overlook contract or other contracts. No other offense is charged and no other offense may be considered by you.
>
> B. That part of the plan was to be that Mannella was to be the spokesman for him (Rosa) in relating the amount of money to be paid and the threats allegedly stated. And that the second meeting occurred. And Mannella did demand the money and did make the threat.
>
> C. That Rosa intended the threat to be real, that is, serious, and he intended that Vacarello would be frightened by the threat.
>
> D. That Vacarello had a reasonable basis upon which to conclude that the defendants could have prevented him from getting the Overlook contract or other contracts from the Borough of Monroeville.



> E. That Vacarello believed the threats, that is, that he was anxiously concerned by them.
>
> F. That if the extortion had been carried out and the $10,000.00 paid, interstate commerce would have been affected."[12]

The Court gave an almost identical charge as to what was necessary to convict defendant Sica. (Tr. 386-387). Also, the court gave a charge on aiding and abetting under 18 U.S.C. § 2.

Both Rosa and Sica now contend that the evidence was insufficient as a matter of law to permit a jury to find guilt under the court's charge. We disagree.

The government's principal witness, Joseph Vacarello, Jr., testified that he received a phone call on the morning of July 23, 1974, requesting that he come to Mannella's office, which he did. Upon his arrival, Mannella introduced him to defendants, Rosa and Sica. Following the introductions, Vacarello testified:

> "A. . . . Mr. Manella said, 'Did you bid a job in Monroeville?' And I said, 'Yes, I did.' 'Well, Overlook Park?' And I said, 'Yes', Then Mr. Sica said, 'We represent several councilmen from the Borough of Monroeville and you are a friend of Vince's and Vince is a friend of yours and we have a problem with the job and we would like to see you get the job but we would like a donation.'
>
> Q. What did you say, sir?
>
> A. I said, 'Okay, fine, depending on what you want.' "[13]

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12. Tr. 384-385, 404-405.
13. Tr. 64-65.

Vacarello said that at the time he had no idea what type of problem Sica was talking about nor what type of donation he was talking about. Later, Vacarello testified that he was told that Vince would call him later, after which he left Mannella's office. Later that same day, Vacarella testified that he received a phone message from his answering service that Mannella's office had called. According to his testimony, when Vacarello returned the call Mannella requested that he come up, which he did. Only he and Mannella were present at this second meeting.

"Q. What conversation, if any, took place at that time.

A. At that time Mr. Mannella told me what the amount of the donation was, or whatever it was.

Q. What amount did he specify?

A. $10,000.00.

Q. What did you say?

A. I was sort of shocked, I says, you know, no way, it is ridiculous.

Q. What did he say?

"A. Well, I don't know, let me think a minute here—when he told me $10,000, I says, 'Christ, that is ridiculous, there is no way it could be paid on a job of this size' and I told Mr. Mannella, he is an engineer, I mean, he knows what things are. I said, "Who the hell am I supposed to make this check to anyway?' Mr. Mannella said, 'We don't take checks, it is cash in an envelope to me.'

Q. What did you say?

A. I said, 'There is no way that I would pay it.' "[14]

14. Tr. 72-73.



Upon being asked if Mannella told him why he had brought Vacarello and the other two defendants together, Vacarello answered:

"A. Mr. Mannella said that I was apparently angry. He said, 'Look, they are a friend of mine, you are a friend of mine. All I did here, all I am doing is getting you together.' "

* * *

"Q. Did you still at this time, did you have any knowledge of what your problem was?

A. No, I did not.

Q. Did you find out at that meeting with Mr. Mannella what your alleged problem was?

A. Well, at that time at that second meeting, Mr. Mannella showed me the copy of the minutes of a Monroeville committee meeting."[15]

Those minutes rejected Vacarello's bid on the Overlook Park project and Vacarello testified that it was then that he realized what his "problem" was. When Vacarello said, "They do other work in Monroeville," Mannella responded, "Save your time, save your money," or something on that order. Vacarello then left Mannella's office.

The government submits that the evidence clearly established a common scheme, whereby the three defendants, designating Mannella as their spokesman and middleman, attempted to "shake down" Vacarello, and that despite the fact that only Mannella was present at the time of the attempt,[16] defendants Rosa and Sica were

15. Tr. 78.

16. The jury was instructed that there was no attempt at any extortion at the morning meeting of July 23, 1974, as a matter of law.

equally guilty because of their presence and participation at the earlier meeting.

As previously mentioned, the court instructed the jury under 18 U.S.C. § 2, the aiding and abetting statute. This was necessary inasmuch as the jury was instructed that there was no attempt to extort as a matter of law at the morning meeting. Since defendants Rosa and Sica were not actually present at the time of the attempt, they were necessarily convicted as aiders and abettors.

In order to aid and abet another to commit a crime it is necessary that the defendant associate himself with the criminal enterprise, that he participate in it as something which he wishes to bring about and that he seeks by his action to make it succeed. *United States v. Barber,* 429 F.2d 1394, 1397 (3rd Cir. 1970), quoting *United States v. Peoni,* 100 F.2d 401, 402 (2d Cir. 1938), quoted with approval in *Nye & Nissen v. United States,* 336 U.S. 613, 619 (1949). Mere presence at the scene of a crime, even in the company of one or more of the principal wrongdoers, does not alone make one an "aider and abettor," unless the jury is convinced beyond a reasonable doubt that defendant was doing something to forward the crime and that he was a participant rather than merely a knowing spectator. *United States v. King,* 402 F.2d 289, 291 (10th Cir. 1968); see *Hicks v. United States,* 150 U.S. 442 (1893); *United States v. Barber, supra.* Stated otherwise, to convict a person of aiding and abetting, his conduct or other special circumstances attending his presence at a crime must be such as to show that he had associated himself with and participated in the criminal undertaking, and something of significance beyond his mere presence is necessary to justify conviction. *United States v. Barber, supra,* at



1397. Furthermore, in *Barber* the court said that in order to prevent onlookers from being convicted,

> "The courts have responsibility to make sure that mere speculation is not permitted to substitute for proof of group activity in crime."

See *Government of the Virgin Islands v. Navarro,* 513 F.2d 11 (3rd Cir. 1975).

However, an act of relatively slight importance may warrant a jury's finding of participation in a crime. *United States v. Burrell,* 496 F.2d 609, 610 (3rd Cir. 1974). Participation may also be shown by circumstantial evidence as well as by direct evidence, *United States v. Garguilo,* 310 F.2d 249, 253 (2d Cir. 1962). In deciding whether circumstantial evidence supports a conviction the question is whether all the pieces of evidence against the defendant, taken together, make a strong enough case to let a jury find him guilty beyond a reasonable doubt. *United States v. Pratt,* 429 F.2d 690, 694 (3rd Cir. 1970).

It is essential that the proof against each defendant must be individual and personal, *United States v. DeCavalcante,* 440 F.2d 1264, 1275 (3rd Cir. 1971), *United States v. Klein,* 515 F.2d 751 (3rd Cir. 1975) and mere association with conspirators or knowledge of the illegal activity is not sufficient. *United States v. Prince,* 515 F.2d 564, 567 (5th Cir. 1975).

Since defendants Rosa and Sica were not convicted on the basis of their being present at the scene of the crime, (they were not present when the crime was committed) we must decide as to each whether there is evidence, either direct or circumstantial, to support the finding that each was guilty of aiding and abetting in the attempted extortion.

First, as to defendant Sica, the testimony is that Sica was the one who told Vacarello he had a problem and that "we" would like a donation. Furthermore, Sica told Vacarello that Mannella would call him later that day. Sica argues, and we agree, that in order for the conviction to stand it is necessary to infer that Sica appointed Mannella as his spokesman. Sica argues that the evidence was insufficient to go to a jury without accepting a theory of vicarious liability for the phone call, and imputed authority to make the demands. While there is not direct evidence that either Rosa or Sica knew what Mannella was going to say, we believe that by his participation in the earlier meeting Sica *did* associate himself with the criminal enterprise. We believe that there is clearly evidence from Sica's statement that "Vince will call you" that he intended to associate himself with Mannella. We, therefore, reject Sica's argument.

While the evidence against Rosa was not as strong as against the other defendants, it was sufficient to enable a reasonable man to conclude that Rosa was guilty of the offense charged beyond a reasonable doubt. In our view, Rosa's argument is fatally defective in its interpretation of the conclusions which the jury could draw from his presence in Mannella's office during the morning meeting.

Defendant Rosa's argument is that since Rosa did not say or do anything which instilled any fear in Vacarello and since Rosa never demanded or attempted to demand any money from Vacarello, his mere presence at the morning meeting is insufficient evidence as a matter of law of his participation in the attempt to extort. Further, Rosa contends that his presence in Mannella's office at the time of the meeting cannot support the jury



verdict finding him guilty of elements "A" through "F" of the court's charge.

We disagree since we find that the jury could conclude on the basis of all the evidence that Rosa had associated himself with the extortion scheme and like Sica, had appointed Mannella as his spokesman. While the evidence of Rosa's participation is entirely circumstantial, it is sufficient to sustain the conviction.

## *V*

## Other Claimed Errors

We have carefully examined all other claims of error in defendants' motions and find them to be without merit. In our view, only one of those claimed errors requires discussion, *i.e.*, whether the court committed prejudicial error in allowing Vacarello to testify as to a conversation which occurred subsequent to the attempt between himself and defendant Mannella wherein Mannella asked him: "Did you pay those fellows the $7,500?"[17]

Defendants, citing *Krulewitch v. United States*, 336 U.S. 440, contend that the court erred in permitting Vacarello to testify to that conversation over defendants' objection. They contend that the conversation complained of amounted to a statement by an alleged co-conspirator after the conspiracy was at an end which *Krulewitch* held could not be used against the declarant's co-defendants. We disagree.

In the first place, the conspiracy charge was dismissed on defendant's motion prior to admission of the evidence now complained of. Furthermore, we do not

17. See Tr. 135-144.

believe that the statement is hearsay since it was not offered to prove the truth of the matter asserted but rather to show Mannella's guilty knowledge of an attempt. Under the government's theory wherein Mannella was a spokesman for Rosa and Sica, the statement was likewise admissible against them. *Cf. Anderson v. United States,* 417 U.S. 211 (1974); *United States v. Lutwak,* 344 U.S. 604, 617-618 (1952).

In our judgment, the post trial motions should therefore be denied.

IN THE UNITED STATES DISTRICT COURT
For the Western District of Pennsylvania

UNITED STATES OF AMERICA,
v.
FRANK JOSEPH ROSA, a/k/a "JOE," JOSEPH SICA, and VINCENT MANNELLA,
*Defendants.*

Criminal Action No. 75-80.

ORDER

AND NOW, October 29, 1975, the post trial motions of defendants, Frank Joseph Rosa and Joseph Sica, in arrest of judgment and of acquittal and for new trial are denied.

All defendants shall appear in Court Room No. 10 on November 20, 1975, at 10:00 A.M., for the imposition of sentence.

BARRON P. MCCUNE,
*United States District Judge*



**APPENDIX C.**

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 75-2411

UNITED STATES OF AMERICA
v.
JOSEPH SICA,
*Appellant*

APPEAL FROM THE FINAL JUDGMENT OF SENTENCE OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Criminal No. 75-80

Argued April 6, 1976
Before: BIGGS, GIBBONS and HUNTER, *Circuit Judges.*

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JOHN W. MURTAGH, JR., Esquire
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**Opinion of the Court**
(Filed October 20, 1976)

BIGGS, *Circuit Judge.*

This is an appeal from a judgment of conviction and sentence in the United States District Court for the Western District of Pennsylvania. Jurisdiction is based on 28 U.S.C. § 1291.

The factual background is set forth in *United States v. Rosa,* 404 F. Supp. 602 (W.D. Pa. 1975). We therefore restrict out discussion to what we deem to be the essentials. Two other defendants, Rosa and Mannella, were indicted with Sica for conspiracy and attempted extortion in violation of the Hobbs Act. 18 U.S.C. § 1951. Both were convicted and their judgments of conviction were affirmed by this Court. *United States v. Rosa,* 535 F.2d 1248 (3d Cir. 1976), *petition for cert. filed,* 44 U.S.L.W. 3750 (U.S. June 29, 1976) (No. 1738). The conspiracy count was dismissed and is not before us. The second count was retained and trial proceeded on this count.

## I. FACTS

The chief government witness was Joseph Vacarello,[1] Jr., who was a part-owner of a landscape contracting concern. Defendant Mannella, an engineer, had business dealings with Vacarello in the past. At the behest of Mannella, Vacarello came to Mannella's office on the morning of July 23, 1974. Mannella introduced him to defendants Rosa and Sica. Sica characterized himself as a "representative" of "several" councilmen of the Borough of Monroeville, Pennsylvania. Vacarello had recently submitted a bid on the Overlook Park project in Monroeville. Sica told Vacarello "we would like to see you get the job, but . . . would like a donation." Transcript, page 65. The size of the donation was not specified. Vacarello testified that Sica indicated that Mannella would call later concerning the size of the donation.

1. The District Court spelled this witness' name as indicated. The transcript spelled it with two "c" 's. Since other portions of the record appear consistent with the District Court's spelling, we adopt it.



That afternoon Mannella called and asked Vacarello to again come to his office. Vacarello went immediately and was told by Mannella, who was alone, that the donation was to be $10,000. Mannella implied that failure to make it would mean that Vacarello would not be considered for other Monroeville projects, as well. Vacarello was shown the recent minutes of the Public Relations and Recreation Committee of Monroeville. The committee had recommended to the Borough Council that Vacarello's low bid on the Overlook project not be accepted. There was some discussion of how the money was to be split among Rosa, Sica, and Mannella and Mannella's role as go-between. Transcript, pages 74, 78.

Vacarello did not pay the "donation" and did receive the contract for the Overlook Park project. So far as the record shows, he was not denied subsequent contracts.

Sica's appeal presents an issue as to severance which we think requires discussion. We must deal with a preliminary issue first, however.

## II. LAW

### A. *The Crime of Attempted Extortion*

The Hobbs Act, 18 U.S.C. § 1951, provides in pertinent part: "(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extor-

tion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

"(b) As used in this section—* * * (2) The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right."

In the second count the indictment charged the three defendants as follows:

". . . 2. That on or about July 23, 1974, an continuing until on or about August 15, 1974, in the Western District of Pennsylvania and elsewhere, the defendants, FRANK JOSEPH ROSA, a/k/a 'JOE', JOSEPH SICA and VINCENT MANNELLA, did unlawfully and wilfully attempt to obstruct, delay and affect interstate commerce, as the term 'commerce' is defined in and by Section 1951, Title 18, United States Code, and the movement of articles and commodities in commerce by extortion as the term 'extortion' is defined in and by Section 1951, Title 18, United States Code; that is to say the said *defendants did wrongfully and unlawfully attempt to obtain property of the value of $10,000 in the form of money from Joseph Vacarello, Jr.,* as agent and owner of Penn Landscape and Cement Work with his consent induced by wrongful use of fear in that the said defendants did threaten the said Penn Landscape and Cement Work and Joseph Vacarello, Jr., with loss of the 'Overlook Park' project and other contracts unless and until the



Penn Landscape and Cement Work and Joseph Vacarello, Jr. paid the defendants the said amount of money.

"All in violation of Title 18, United States Code, Section 1951." (Emphasis added).

Sica argues that, as used in the Hobbs Act, the word "attempts" modifies only "obstructs, delays or affects commerce" and does not modify "extortion". If Sica's understanding of the statute is correct, his conduct would not be proscribed because it amounted only to attempted extortion.

*United States v. Starks,* 515 F.2d 112, 116 (3d Cir. 1975),[2] would seem to support the position of the United States on this issue albeit the pertinent language may be deemed to be *dictum,* for *Starks* assumes, rather than decides, that the Hobbs Act covered attempt to extort. There are, however, many cases whose holdings support the position of the United States.[3] Of these cases, *United States v. Iozzi,* 420 F.2d 512 (4th Cir. 1970), *cert. denied,* 402 U.S. 943 (1971), bears a strong resemblance to the instant case. Iozzi was indicted, *inter alia,* for attempted

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2. In *Starks,* we stated: "The Hobbs Act proscribes a number of separate offienses: (1) robbery; (2) extortion; (3) *attempted robbery or extortion;* and (4) conspiracy to commit robbery or extortion." 515 F.2d at 116 (Emphasis added).

3. United States v. Jacobs, 451 F.2d 530 (5th Cir. 1971), *cert. denied,* 405 U.S. 955 (1972); United States v. Iozzi, 420 F.2d 512 (4th Cir. 1970), *cert. denied,* 402 U.S. 943 (1971); United States v. Tropiano, 418 F.2d 1069 (2d Cir. 1969), *cert. denied,* 397 U.S. 1021 (1970); Anderson v. United States, 262 F.2d 764 (8th Cir.), *cert. denied,* 360 U.S. 929 (1959); United States v. Green, 246 F.2d 155 (7th Cir.), *cert. denied,* 355 U.S. 871 (1957).

extortion. There was "fear of economic loss" in that the defendant demanded, but did not receive, a sum of money in exchange for a trouble-free construction job. The evidence showed only that the threatened individuals, as here, could reasonably anticipate economic loss. *Id.* at 515.

Sica fails to cite any case where a court has squarely broached his novel statutory construction and found attempted extortion outside the Hobbs' proscription. The weight of the above precedent and the Act's legislative history[4] compel us to find that attempted extortion is

4. The legislative history is set out by the District Judge at 404 F. Supp. 607-09. The Hobbs Act was derived from the Anti-Racketeering Act of 1934. United States v. Varlack, 225 F.2d 665, 671 (2d Cir. 1955). After the Supreme Court restricted the scope of the 1934 Act in *United States v. Teamsters Local 807,* 315 U.S. 521 (1942), the statute was amended to provide: "Sec. 2. Whoever in any way or degree obstructs, delays, or affects commerce, or the movement of any article, or commodity in commerce, by robbery or extortion shall be guilty of a felony. * * * Sec. 4. Whoever *attempts or participates in an attempt to do anything in violation of section 2 shall be guilty of a felony.*" Act of July 3, 1946, ch. 537, §§ 2, 4, 60 Stat. 420 (Emphasis added). The *Varlack* court observed: "Nothing in the legislative history of the 1946 amendment or the 1948 codification [62 Stat. 793] indicates a congressional purpose to effect a change in the 1934 Act in so far as it was aimed at conspiracies to extort or rob or attempts to extort or rob which obstruct, delay or affect foreign or interstate commerce. Moreover, the reviser's notes to Title 18, § 1951 indicate quite clearly that the 'changes in phraseology and arrangement' were designed solely to effect consolidation." United States v. Varlack, *supra* at 672. We agree. *See* Callahan v. United States, 364 U.S. 587, 591 n.5 (1961).



unlawful.[5]

In view of the appellant's conviction, we review the record in the light most favorable to the government. *Glasser v. United States,* 315 U.S. 60, 80 (1952). The evidence is sufficient to sustain Sica's judgment of conviction on the second count. We come now to the severance question.

B. *The Issue of Severance*

Federal Rule of Criminal Procedure 14[6] authorizes severance if it is required to avoid prejudice. A District Judge has the power to order a severance under Rule 14 and has a "continuing duty at all stages of the trial to grant a severance if prejudice does appear." *Schaffer v.*

5. Sica attempted to extort by inducing fear of contract loss. He argues here that here was no fear of economic harm derived from Sica *et al.* because any fear induced was due to the Recreation Committee's action. Sica does not present any convincing argument showing that Vacarello would be unreasonable in believing that Sica *et al.* could influence the ultimate decision maker, the Borough Council, to deprive him of the Overlook contract if payment were not made. *Cf.* United States v. Mazzei, 521 F.2d 639, 643-44 (3d Cir.) (*en banc*), *cert. denied,* 423 U.S. 1014 (1975).

6. Rule 14 provides: *"Relief from prejudicial joinder.* If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to the court for inspection in camera any statements or confessions made by the defendants which the government intends to introduce in evidence at the trial."

*United States,* 362 U.S. 511, 516 (1960). The standard to determine whether a severance motion was properly denied is the old one of whether the trial court abused its discretion. The appellant concedes that the burden is on him to demonstrate that a joint trial has so prejudiced him as to deny him a fair trial. In *United States v. Somers,* 496 F.2d 723 (3d Cir.), *cert. denied,* 419 U.S. 832 (1974), we said that "[t]he burden of demonstrating such abuse is a heavy one." *Id.* at 730. See also *United States v. Armocida,* 515 F.2d 29, 46 (3d Cir.), *cert. denied,* 423 U.S. 858 (1975).

Sica moved for a severance on two occasions during the trial on the grounds that, without severance, he would be unable to call defendant Rosa to testify as Sica's witness.[7] Both motions were denied. Essentially, both raise the same issue. Because Rosa did not testify and could not be compelled to do so, Sica argued that Sica was prejudiced by his inability to introduce Rosa's exculpatory testimony. The following showing was made by Sica's counsel:

> "MR. LIVINGSTON: It having been represented to me by Mr. Rosa in the presence of his counsel that he could if called exculpate or provide testimony that would tend to exculpate Mr. Sica including but not limited to testimony that Mr. Sica is the father-in-law of Mr. Rosa and Mr. Rosa had a business relationship with Mr. Mannella and on the occasion of July 23 Mr. Sica went along with Mr. Rosa to Mr. Mannella's office and did not participate in any conversation with Mr. Vaccarello [sic] or Mr. Mannella as has been testified to by Mr. Vaccarello. It has been by inference suggested to me that there are

7. Tr. 323-25, 364-65.



> other matters that Mr. Rosa would not discuss with me. It appear[s] that other matters may tend to incriminate him. He indicated a willingness to testify to these exculpatory matters, [if] not called in this particular trial . . ."[8]

We therefore have a statement by Sica's counsel that Rosa would testify in the exculpatory manner stated if a severance were granted. See *United States v. Kahn,* 366 F.2d 259, 264 (2d Cir.) *cert. denied,* 385 U.S. 948 (1966). There is no corroborating statement by Rosa as to what he would say or whether he intended to testify on Sica's behalf and nothing was said by Rosa's counsel. Unquestionably Rosa's counsel was present at sidebar during Mr. Livingston's representation, and we cannot assume that a member of the Pennsylvania bar in good standing would let Mr. Livingston's statements stand uncontradicted if he did not deem them to be correct. Mr. Livingston's statement was therefore supported by an implicit representation that Rosa would in fact contradict some of Vacarello's testimony respecting the crucial meeting on July 23, 1974.

The learned District Judge denied the motion without comment but stated in his opinion filed later: "In this case, on the other hand, defendant Sica merely represented that Rosa would testify in a manner exculpating Sica if either were severed. In *United States v. Kahn,* 381 F.2d 824, 841 (7th Cir. 1967), the court stated: 'The unsupported possibility that such testimony might be forthcoming does not make the denial of a motion for severance erroneous.' Furthermore, the cases are consistent in their holding that a defendant must make a showing

8. Tr. 364.

that the testimony would be exculpatory in effect. See, e.g., *Smith v. United States,* 385 F.2d 34, 38 (5th Cir. 1967), *Byrd v. Wainwright,* 428 F.2d 1017, 1020 (5th Cir. 1970).[9] *United States v. Kaufman,* 291 F. Supp. 451 (S.D. N.Y 1968). That showing was not made here." 404 F. Supp. at 614-15. We cannot agree.

If we assume the truth of Vacarello's version of the meeting of July 23, 1974, the evidence against Sica while largely circumstantial, nonetheless meets the standard of *Glasser v. United States,* 315 U.S. 60, 80 (1942). On the motions for severance the issue is whether the availability of testimony which contradicted the version of the government's sole witness to the sole meeting involving Sica might have produced a different verdict. In *United States v. Somers,* 496 F.2d 723, 731 (3d Cir.), *cert. denied,* 419 U.S. 832 (1974), this court certainly intimated that the denial of a severance motion which had the effect of depriving the defendant of exculpatory testimony of a co-defendant would be impermissible. Clearly, if Rosa testified as represented by Mr. Livingston, the testimony would be exculpatory.

The Fifth Circuit has spelled out five functional rules for ascertaining whether a severance should be granted on the proffer of exculpatory evidence. *Byrd v. Wainwright,* 428 F.2d 1017, 1019-20 (5th Cir. 1970):

> "(1) Does the movant intend or desire to have the codefendant testify? How must his intent be made known to the court, and to what extent must the court be satisfied that it is bona fide?

9. The court in *Byrd v. Wainwright,* 428 F.2d 1017, 1020 (5th Cir. 1970), did rely on oral presentation by defendant's counsel in granting severance. See 404 F. Supp. at 615.



> "(2) Will the projected testimony of the codefendant be exculpatory in nature, and how significant must the effect be? How does the defendant show the nature of the projected testimony and its significance? Must he in some way validate the proposed testimony so as to give it some stamp of verity [?].
>
> "(3) To what extent, and in what manner, must it be shown that if severance is granted there is likelihood that the codefendant will testify?
>
> "(4) What are the demands of effective judicial administration and economy of judicial effort? Related to this is the matter of timeliness in raising the question of severance.
>
> "(5) If a joint trial is held, how great is the probability that a codefendant will plead guilty at or immediately before trial and thereby prejudice the defendant, either by cross-defendant prejudice or by surprise as it relates to trial preparation?" (Footnotes omitted.)

In this case rules (1) and (3) were unquestionably satisfied, and rule (5) is not involved. The fourth, the timeliness of the tender in light of judicial economy, is not even urged by the government, and on this record could not be. The critical factor is the exculpatory value of the tendered testimony. In judging that factor it must be kept in mind that Sica was kept in the case at the end of the government's proofs solely on one theory: that he had silently acquiesced in conversations testified to by Vacarello which suggested that defendants Mannella and Rosa at later meetings would be acting on his behalf. The denial of the severance motion served to deprive Sica of

the one witness who could have contradicted Vacarello on the contents of the conversation. The district court did not find that Rosa would not have testified in the manner claimed or that Sica's counsel made the motion in bad faith. The government's case against Sica was thin, and the testimony of a witness who could impeach the one government witness upon whom that case depended cannot be regarded as de minimis.

The distinguished District Judge seems to have taken the position that the offer of proof was insufficiently specific. But how much more specific could it have been, considering that while the joint trial continued Rosa continued to assert the privilege against self-incrimination? The representation in our view was sufficiently explicit to sustain a severance.[10]

Accordingly, we will reverse Sica's judgment of conviction.

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HUNTER, *Circuit Judge*, dissenting:

Finding no abuse of discretion, I respectfully dissent. My reliance is upon a full review of the record and upon Judge McCune's thorough opinion reported at 404 F. Supp. 602 (W.D. Pa. 1975).

Therefore, I would affirm.

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10. We make the suggestion that in the future counsel seeking a severance put the evidence relied on in the record.



## APPENDIX D.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 75-2411

---

UNITED STATES OF AMERICA
v.
JOSEPH SICA,
*Appellant*

(D. C. Crim. No. 75-80)

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Present: SEITZ, *Chief Judge,* and BIGGS, VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS and GARTH, *Circuit Judges.*

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Upon consideration of appellee's petition for rehearing en banc in the above-entitled appeal, and a majority of the active judges having voted for rehearing en banc,

It is ORDERED that appellee's petition for rehearing in the above-entitled appeal be, and hereby is, granted; and

It is FURTHER ORDERED that the judgment of this court entered October 20, 1976, be, and hereby is, vacated; and

It is FURTHER ORDERED that the Clerk of this Court list this appeal for rehearing before the court en banc, at a time to be set at the convenience of the court.

BY THE COURT:—

VAN DUSEN
Circuit Judge

Dated: December 16, 1976

**APPENDIX E.**

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 75-2411

---

UNITED STATES OF AMERICA
v.
JOSEPH SICA,
*Appellant*

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On Appeal From the United States District Court
For the Western District of Pennsylvania
(D. C. Crim. No. 75-80)

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Argued April 6, 1976

Present: BIGGS, GIBBONS and HUNTER, *Circuit Judges.*

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Reargued May 12, 1977

Present: SEITZ, *Chief Judge,* BIGGS, VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS and GARTH, *Circuit Judges.*

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(Filed July 6, 1977)

HUNTER, *Circuit Judge*:

Joseph Sica appeals from his conviction on a charge of attempted extortion in violation of the Hobbs Act, 18 U.S.C. § 1951.[1] He argues that (1) the Hobbs Act cannot be interpreted to reach the activity—attempted extortion—in which he allegedly engaged; (2) there was not substantial evidence to support the conviction; (3) the trial court's refusal to grant him a severance from his co-defendants prejudiced his right to a fair trial; and (4) the court's charge to the jury was fatally defective, because it did not contain the "accomplice charge" sought by Sica. Finding no merit in any of these claims, we affirm.

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1. 18 U.S.C. § 1951 provides as follows:

> § 1951. Interference with commerce by threats or violence
>
> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

I.

Joseph Sica, Frank Joseph Rosa, and Vincent Mannella were indicted on February 26, 1975, in the District Court for the Western District of Pennsylvania. Count I

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1. (Cont'd.)

(b) As used in this section—

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45.



of the indictment alleged a conspiracy to violate 18 U.S.C. § 1951; it was dismissed during trial and is of no further relevance. Count II charged that from July 23, 1974, to August 15, 1974, Sica, Rosa, and Mannella unlawfully and wilfully attempted to obstruct, delay, and affect interstate commerce and the movement of articles and commodities in commerce by extortion, in violation of 18 U.S.C. § 1951.

Trial began on August 5, 1975. The first of two Government witnesses was Katherine Vlack Kendall. She testified that during the summer of 1974, she had been employed as a secretary by Mannella Engineers. At some point during the summer, Rosa and Sica both arrived to see Vincent Mannella. Kendall could not recall the date of this meeting, but she testified that Rosa and Sica were together at the office on only one occasion.

While Rosa and Sica were with him, Mannella had Kendall call Joseph Vacarello and ask Vacarello to come to the office. Vacarello arrived shortly thereafter. Kendall testified that she did not know what took place among the four men.

The Government's chief witness was Joseph Vacarello, part-owner of a landscaping and contracting business. He testified that on July 23, 1974, he received a telephone call from Mannella, requesting that he come to Mannella's office. He complied, and Mannella introduced him to Sica and Rosa upon his arrival.

Vacarello testified that Mannella began to talk about the Overlook Park project, a job on which Vacarello's company had a few weeks earlier submitted the lowest bid to the Borough of Monroeville, Pennsylvania. Sica then identified himself and Rosa as representatives

of several unnamed members of the Borough Council. Sica said that there was some problem with the project, that they would like to see Vacarello get the job, but that they would like a "donation." Sica told Vacarello that Mannella would call Vacarello later about the donation, and Mannella agreed.

That afternoon, according to Vacarello, Mannella called and asked Vacarello to come to his office again. Upon his arrival, he found Mannella alone. Mannella immediately told him that the donation was to be $10,000. Vacarello refused to pay. Mannella then clarified the "problem" to which Sica had alluded earlier in the day. He showed Vacarello a copy of the minutes of a recent Monroeville Recreation Committee meeting, which disclosed that the Committee had recommended that Vacarelo not be awarded the Overlook Park project.

Vacarello still refused to pay, telling Mannella that he would simply bid on other Monroeville projects. Mannella warned him to save his time and money. There was also, according to Vacarello, some discussion of how Rosa, Sica and Mannella would split the donation.

Vacarello left without agreeing to pay. Nevertheless, he did receive the Overlook Park contract. As far as the record shows, he was not subsequently denied other Monroeville contracts.

Mannella was the only witness for the defense. He testified that there was only one meeting, the one on the morning of July 23, 1974. He claimed that at the time of the alleged afternoon meeting, he had been out of his office. He denied any intention to extort money from Vacarello.

The jury evidently believed Vacarello. It convicted all three defendants. All post-trial motions were denied



in a thorough and thoughtful opinion by the district judge, *United States v. Rosa,* 404 F. Supp. 602 (W.D. Pa. 1975). This Court affirmed the convictions of Rosa and Mannella without opinion. *United States v. Rosa,* 535 F.2d 1248 (3d Cir. 1976), *cert. denied,* 45 U.S.L.W. 3249 (U.S., October 10, 1976). A panel of this Court reversed Sica's conviction, *United States v. Sica,* No. 75-2411 (3d Cir. 1976), but the court in banc vacated the panel judgment and granted the Government's petition for rehearing on December 16, 1976.

II.

Sica argues that a judgment of acquittal should have been entered, because the statute under which he was indicted, 18 U.S.C. § 1951, does not proscribe the activity in which he was proven[2] to have engaged, *i.e.,* attempted extortion in an attempt to obstruct commerce. His argument turns largely on his reading of section 1951(a):

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than twenty years, or both.

Sica insists that the phrase "attempts or conspires so to do" refers to obstruction of commerce, not to extortion. Three expert grammarians submitted a letter in

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2. Because this is an appeal from a judgment upon a verdict of guilty, we must adopt the view of the evidence most favorable to the Government. Glasser v. United States, 315 U.S. 60, 80 (1942).

support of this position. Thus, says Sica, the Act prohibits an attempt to obstruct commerce by completing the act of extortion, but it does not by its terms reach merely an attempted extortion. And because an attempt to commit a federal offense is itself an offense only when statutorily proscribed, Sica concludes that proof of his attempt to extort money from Vacarello does not establish any violation of section 1951.

This Court has already indicated, in dictum, that the Hobbs Act does prohibit attempted extortion in an attempt to obstruct commerce. *United States v. Starks,* 515 F.2d 112, 116 (3d Cir. 1975). As far as out research discloses, every court of appeals that has ruled on the question has reached a similar conclusion. *United States v. Iozzi,* 420 F.2d 512 (4th Cir. 1970), *cert. denied,* 402 U.S. 943 (1971); *United States v. Tropiano,* 418 F.2d 1069, 1082-83 (2d Cir. 1969), *cert. denied,* 397 U.S. 1021 (1970); *United States v. Green,* 246 F.2d 155, 157 (7th Cir.), *cert. denied,* 355 U.S. 871 (1957); *Hulahan v. United States,* 214 F.2d 441, 445 (8th Cir.), *cert. denied,* 348 U.S. (1954); *see United States v. Shackleford,* 494 F.2d 67 (9th Cir.), *cert. denied,* 417 U.S. 934 (1974); *United States v. Jacobs,* 451 F.2d 530, 534 (5th Cir. 1971), *cert. denied,* 405 U.S. 955 (1972).

This conclusion squares with the legislative history of the Hobbs Act. Section 1951 derives from the Anti-Racketeering Act of 1934, 48 Stat. 979. Section 2 of the 1934 Act described persons who would be guilty of felony for doing certain things; among them was the following:

> Any person who, in connection with or in relation to any act in any way or in any degree affecting trade or commerce or any article or commodity



> moving or about to move in trade or commerce—
>
> (a) Obtains *or attempts to obtain, by the use of or attempt to use* or threat to use force, violence, or coercion, the payment of money or other valuable considerations . . .

(Emphasis added). Congress amended the Act in 1946, in response to a restrictive reading by the Supreme Court.[3]

The amended Act, 60 Stat. 420, read in part as follows:

> Sec. 2. Whoever in any way or degree obstructs, delays, or affects commerce, or the movement of any article or commodity in Commerce, by robbery or extortion, shall be guilty of a felony.
>
> Sec. 3. Whoever conspires with another or with others, or acts in concert with another or with others to do anything in violation of section 2 shall be guilty of a felony.
>
> Sec. 4. Whoever *attempts or participates in an attempt to do anything in violation of section* B shall be guilty of a felony.

(Emphasis added.) Thus, an attempt to commit extortion in order to obstruct commerce seems to have been within the purview of the 1946 Act.

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3. In United States v. Teamsters Local 807, 315 U.S. 521 (1942), the Court declared that certain terrorist activities carried out by labor organizations fell outside the scope of the Anti-Racketeering Act. In response, Congress passed amendments in 1946, 60 Stat. 420, which were designed to bring labor terrorism within the Acts ban. *See* United States v. Callanan, 364 U.S. 587, 590-91 (1961); United States v. Yorkley, 542 F.2d 300, 302-03 (6th Cir. 1976); United States v. Varlack, 225 F.2d 665, 669 (2d Cir. 1955).

The Act was codified in 1948, and the separate sections dealing with conspiracies and attempts were consolidated with section 2. 62 Stat. 793 c. 645. This gave section 1951 its present form. Nothing in the legislative history of the codification, however, suggests any intention to change the Act's ban on attempts to rob or extort. Indeed, the evidence suggests the contrary. The reviser's notes to Title 18, § 1951 state that changes in phraseology and arrangement were designed solely to effect consolidation. *United States v. Varlack,* 225 F.2d 665, 672 (2d Cir. 1955).[4]

We hold, therefore, that section 1951 forbids attempted extortion which would, if the act were completed, have the effect of obstructing commerce. This holding gives effect to the apparent intent of Congress and the obvious purpose of the statute.[5]

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4. The House Report dealing with the 1948 codification explained the change:

> The words "attempts or conspires so to do" were substituted for sections 3 and 4 of the 1946 act, omitting as unnecessary the words "participates in an attempt" and the words "or acts in concert with another or with others", in view of section 2 of this title [Title 18] which makes any person who participates in an unlawful enterprise or aids or assists the principal offender, or does anything towards the accomplishment of the crime, a principal himself.

H. R. Rep. No. 304, 80th Cong., 2d Sess A. 131 (1947).

5. Sica also argues that even if section 1951 prohibits attempted extortion, no such attempt was proved as a matter of law. The crime of extortion involves an effort to arouse fear in the victim. Sica insists that neither he nor his cohorts aroused any fear in Vacarello; any fear of property loss—the Overlook Park contract—was induced instead by the actions of the Monroeville Recreation Committee. In light of the not very subtle hints that Sica and the others could influence the ultimate decision maker—the Borough Council—this argument evaporates. The threat to Vacarello's contractual interest was clear, and it emanated from Sica and his co-defendants: pay up and you will get the job; refuse and you will not be considered at all. In addition, Mannella implied that if the "donation" were not forthcoming, Vararello would only be wasting his time by bidding on other Monroeville jobs.



III.

Sica's next contention is that there was insufficient evidence to support his conviction. Specifically, he points out that he was not present at the afternoon meeting, during which the attempt to extort was actually made. He adds that there is no evidence to justify imputing to him the words and actions of Manella at the afternoon meeting.

While it is true that Sica was not present during the actual attempt, there was sufficient evidence[6] to justify

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Sica makes two other frivolous arguments relative to the question of attempted extortion. First, he argues that if we interpret § 1951 to forbid attempted extortion, then it is void for vagueness. In light of the rather clear legislative history and the substantial judicial gloss indicating that the Act does prohibit attempted extortion, we cannot agree.

Second, he insists that if the crime for which he was convicted was attempted extortion, then fatal variance occurred, for the indictment charged him with an "attempt to obstruct, delay and affect interstate commerce . . . by extortion." Since we have already held that the statutory language, tracked by the indictment, embraces attempted extortion, we cannot agree with this claim, either.

6. *See* note 2 *supra.*

the jury's apparent belief that Mannella spoke for Sica. According to Vacarello, it was Sica who said that he and Rosa represented the Monroeville council members. It was Sica who declared: "[W]e would like to see you get the job but we would like a donation." Tr. at 65. And it was Sica who told Vacarello that Manella would call later about the size of the donation.

If the jury believed Vacarello's story—and it obviously did—there was sufficient evidence as a matter of law to support an inference that Mannella spoke on behalf of Sica, that Sica had associated himself with the criminal enterprise. *United States v. Barber,* 429 F.2d 1394, 1397 (3d Cir. 1970).

## IV.

Sica claims that his right to a fair trial was prejudiced by the trial court's refusal to sever his trial from that of Rosa.[7] But to win reversal on this point, he must show that the refusal to sever amounted to an abuse of discretion, and the "burden of demonstrating such abuse is a heavy one." *United States v. Somers,* 496 F.2d 723, 730 (3d Cir.), *cert. denied,* 419 U.S. 832 (1974). *See also United States v. Armocida,* 515 F.2d 29, 46 (3d Cir.), *cert. denied,* 423 U.S. 858 (1975). Sica fails to carry that heavy burden.

7. Fed R. Crim. P. 14 provides as follows:

> *Relief from prejudicial joinder.* If it appears that a defendant or the government is prejudicated by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to the court for inspection in camera any statements or confessions made by the defendants which the government intends to introduce at the trial.



Just before the Government rested its case, Sica's counsel moved for severance. He alleged that Rosa "has indicated a willingness to testify on behalf of Mr. Sica but that he will not give up his right to refuse to testify in his own trial." Tr. at 324. This motion was denied.

After the Government rested, Sica's counsel made what must be considered a second request for severance, through the request was none too clear:

> MR. LIVINGSTON: It having been represented to me by Mr. Rosa in the presence of his counsel that he could if called exculpate or provide testimony that would tend to exculpate Mr. Sica including but not limited to testimony that Mr. Sica is the father-in-law of Mr. Rosa and Mr. Rosa had a business relationship with Mr. Mannella and on the occasion of July 23 Mr. Sica went along with Mr. Rosa to Mr. Mannella's office and did not participate in any conversation with Mr. Vaccarello [sic] or Mr. Mannella as has been testified to by Mr. Vaccarello. It has been by inference suggested to me that there are other matters that Mr. Rosa would not discuss with me. It appear[s] that other matters may tend to incriminate him. He indicated a willingness to testify to these excudpatory matters, [if] not called in this particular trial. . . .

Tr. 364. Rosa's counsel was present during this statement and remained silent throughout. Again, the trial court denied the motion to sever.

For purposes of discussion, we will assume that Sica did intend to have Rosa testify and that the testimony might have proved exculpatory. The crucial inquiry remains whether Sica has carried his heavy burden, *Somers, supra,* of demonstrating that the refusal to sever his trial was an abuse of discretion. *United States v. Finkelstein,* 526 F.2d 517, 523 (2c Cir. 1975), *cert. denied,* ..... U.S. .....; *see United States v. Addonizio,* 451 F.2d 49, 62-63 (3d Cir.), *cert. denied,* 405 U.S. 936 (1972). We conclude that he has not. The district court properly determined that counsel's showing of possible prejudice to the defendant was insufficient.

The Fifth Circuit has listed several factors a trial court ought to consider in deciding whether to sever the trial of a particular defendant:

> (1) Does the movant intend or desire to have the codefendant testify? How must his intent be made known to the court, and to what extent must the court be satisfied that it is bona fide?
>
> (2) Will the projected testimony of the codefendant be exculpatory in nature, and how significant must the effect be? How does the defendant show the nature of the projected testimony and its significance? Must he in some way validate the proposed testimony so as to give it some stamp of verity[?].
>
> (3) To what extent, and in what manner, must it be shown that if severance is granted there is likelihood that the codefendant will testify?
>
> (4) What are the demands of effective judicial administration and economy of judicial effort? Related to this is the matter of timeliness in raising the question of severance.



> (5) If a joint trial is held, how great is the probability that a codefendant will plead guilty at or immediately before trial and thereby prejudice the defendant, either by cross-defendant prejudice or by surprise as it relates to trial preparation?

*Byrd v. Wainwright,* 428 F.2d 1017, 1019-20 (5th Cir. 1970).[8] Although this court has not had occasion to establish such a list, we find that of the Fifth Circuit illuminating. In light of those factors, we discern no abuse of discretion.

Factor number one was fulfilled. The defendant did express a desire to have co-defendant testify, and that desire was made known to the court.

Factor number two is more conjectural, since there was no separate voir dire requested concerning the projected nature of Rosa's testimony.[9] The significance of the exculpatory effect of Rosa's projected testimony is difficult to gauge in view of the vagueness of counsel's

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8. The Second Circuit established a different list:
> (1) the sufficiency of the showing that the co-defendant would testify at a severed trial and waive his Fifth Amendment privilege . . .; (2) the degree to which the exculpatory testimony would be cumulative . . .; (3) the counter arguments of judicial economy . . .; and (4) the likelihood that the testimony would be subject to substantial, damaging impeachment. . . .

*United States v. Finkelstein,* 526 F.2d 517, 523-24 (2d Cir. 1975), *cert. denied,* —— U.S. ——. Obviously, both the Second and Fifth Circuits are concerned with similar problems. Neither list purports to be exclusive.

9. The holding of such a voir dire would be a proper vehicle for the resolution of the severance motion. It would permit the parties and the court to explore, under oath, the likelihood that the co-defendant would, indeed, testify at any severed trial. It might also allow some consideration of the projected testimony's content.

statement. Sica's family relationship to Rosa and Rosa's business relationship with Mannella had already been proved by other witnesses. The only other allegation was that Rosa would testify that Sica "did not participate in any conversation with Mr. Vaccarello [sic] of Mr. Manella. . . ."

Factor number three is also questionable. While Rosa's attorney did not contradict the statement that Rosa was willing to testify at a separate trial, neither did he promise that Rosa would do so. Instead, he remained silent. We do not imply that Rosa's attorney acted in bad faith. We observe only that there was no commitment by Rosa to follow the course charted by Sica's counsel.

About factor number four there can be no doubt. Judicial economy militated strongly against severance. The proof offered at a separate trial would have been completely duplicative of the proof in the case *sub judice*. Furthermore, the fact that the motion came so late in the course of the trial entitled the court to view it with some skepticism; if Rosa could genuinely exculpate his father-in-law completely at the close of the Government's case, he ought to have been willing to do so at the outset. The timing of the motion simply reinforces the inference that Rosa at that point had little to lose by trying to help Sica get clear of the case.

Factor number five—a guilty plea—is not and cannot be urged.

The balance among these four factors is not an easy one to strike. It is true that Sica was unable to call a witness who might have contradicted the only inculpatory testimony—Vacarello's. But it is also true that Rosa was in a position to do so at absolutely no risk to himself; that he had a family incentive for doing so;



that he never promised he actually would testify; that the lateness of the offer casts some doubt on the authenticity of the projected testimony; that the severed trial would be completely duplicative. In view of the standard of review—abuse of discretion—we are in no position to substitute our judgment for that of the district court. We must allow that court's decision to stand unless we are convinced that Sica was deprived of his right to a fair trial. *Somers, supra* at 730. Sica simply has not carried his heavy burden on that score.

V.

Finally, Sica argues that the court erred in refusing to give the jury a standard accomplice charge, and its "corollary" under *Cool v. United States,* 409 U.S. 100 (1972), with respect to the testimony of Mannella. In general, an accomplice charge[10] need be given only when the alleged accomplice incriminates the defendant. *See, e.g., Crawford v. United States,* 212 U.S. 183, 204 (1909); *Cool, Supra* at 103. In this case, Mannella did not give any testimony inculpating Sica. Indeed, Mannella spent his entire time on the stand denying that any crime had taken place. He did place Sica at the morning meeting, but no crime was committed then; moreover, the testimony of Vlack placed Sica there, too.

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10. A standard accomplice charge would instruct the jury as follows:

> An accomplice is one who unites with another person in the commission of a crime, voluntarily and with common intent. An accomplice does not become incompetent as a witness because of participation in the crime charged. On the contrary, the testimony of one who asserts by his testimony that he is an accomplice, may be received in evidence and considered by the jury, even though not corroborated by other evidence, and given such weight as

*Cool* is totally inapposite. In *Cool,* the trial court impermissibly diminished the Government's burden of proof by instructing the jury that it could consider a defense witnesses's exculpatory testimony only if it found that testimony true beyond a reasonable doubt. Thus, the trial court erred by giving an accomplice charge when the accomplice testified for the defense. Here, the trial judge committed no such error. Indeed he took care to highlight for the jury the exculpatory portions of Mannella's testimony. App. at 630a-32a. *Cool* contains no affirmative requirement that some sort of reverse accomplice charge be given whenever an alleged accomplice testifies for the defense.

VI.

For the foregoing reasons, the judgment of conviction will be affirmed.

To The Clerk:

Please file the foregoing opinion.

James Hunter, III, *Circuit Judge*

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10. (Cont'd.)

the jury feels it should have. The jury, however, should keep in mind that such testimony is always to be received with caution and considered with great care.

(You should never convict a defendant upon the unsupported testimony of an alleged accomplice, unless you believe that unsupported testimony beyond a reasonable doubt.)

E. Devitt & C. Blackmar, Federal Jury Practice & Instructions §17.06 (3d ed. 1977); *see* United States v. Armocida, 515 F.2d 29, 47 (3d Cir. 1975).



UNITED STATES v. SICA, No. 75-2411

Biggs, Circuit Judge, *dissenting.*

I confess to an abiding disquietude as to the result reached by the majority in this case.

I.

Mistaken Interpretation of the Record by the Majority

I am in full agreement with the majority's position that severance is within the sound discretion of the trial court. However, the question remains whether the learned District Judge actually exercised his discretion to deny severance until he filed his opinion on October 29, 1975, some 53 days after the last motion for severance set out in Sica's "Motion for Judgment of Acquittal, for a New Trial, and for Arrest of Judgment,"[1] *viz.,* paragraphs "2" and "7", filed August 18, 1975. See *United States v. Rosa,* 404 F. Supp. 602, 610-611 (1975). Sica made two previous motions for severance, one on August 7, 1975 (Tr. 323; 370a), and another the following day, August 8, 1975 (Tr. 364; 411a). These motions were met with immediate and unexplained denials by the learned Trial Judge. See the transcript and appendix-page citations set out above.

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1. "Motion for Judgment of Acquittal, for a New Trial, and for Arrest of Judgment": "2. The Court erred in refusing to sever defendant Sica from defendant Rosa. . . . 7. Court erred in denying defendant Sica a severance so that he would be able to call in his defense Mr. Frank Joseph Rosa, who, in the presence of his counsel, indicated that he would in a separate trial testify to matters exculpatory in the nature set forth in the transcript and other matters not revealed because incriminatory in nature."

The majority concludes that there was no abuse of discretion by the trial court in denying Sica's motion for severance and in its opinion finds that Sica's offers of proof were neither sufficiently clear nor corroborated. However, it is submitted that the record before us shows no indication the learned Trial Judge exercised his discretion until he rendered his opinion and that he waited until the very end of the trial, *i.e.,* ended by his judgment and opinion in *Rosa,* 404 F. Supp. 602. At that point, of course, no response could be made by Sica to his ruling on the motion or any evidence or corroboration of Sica's good faith could be offered. Had the trial court informed or indicated to Mr. Livingston, Sica's counsel, that he desired a corroborating statement from Rosa as to what he, Rosa, would say, or whether he intended to testify on Sica's behalf, with Rosa's counsel, Mr. Gondelman, standing at sidebar conference with Mr. Livingston, Sica's counsel, as was the case in *Byrd v. Wainwright,* 428 F.2d 1017 (5th Cir. 1970), one must assume that Mr. Gondelman would have informed the court then and there if Mr. Livingston, Sica's counsel, was misstating the facts. I cannot but believe that had the trial court made the suggestion of amplification of the record, that the suggestion would not have been promptly complied with by counsel for Sica. The majority's emphasis upon *Byrd v. Wainwright, supra,* is not misplaced, but should be predicated upon an exercise of discretion by the district court.

The position taken by the Trial Judge seems similar to that of an old time English boxing referee, who merely "keeps the ring" and offers neither act nor word to facilitate the contest, yet Rule 2, Fed. R. Crim. Proc., 18 U.S.C., provides:



> *"Purpose and Construction.* These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay."

## II.

### Erroneous Interpretation by the Majority of Byrd v. Wainwright

The majority analyzes Sica's contention that the district court committed reversible error by refusing his motions for severance, relying on the Fifth Circuit's opinion in *Byrd v. Wainwright,* 428 F.2d 1017 (5th Cir. 1970). I have no quarrel with the majority's reliance on *Byrd* except for the fact that that reliance does not go far enough. *Byrd,* a state habeas corpus case, sets forth five factors which as a matter of a constitutional minimum ought to be considered when a court is faced with a motion to sever. They are:

> "(1) Does the movant intend or desire to have the codefendant testify? How must his intent be made known to the court, and to what extent must the court be satisfied that it is bona fide?
>
> "(2) Will the projected testimony of the codefendant be exculpatory in nature, and how significant must the effect be? How does the defendant show the nature of the projected testimony and its significance? Must he in some way validate the proposed testimony so as to give it some stamp of verity [?].
>
> "(3) To what extent, and in what manner, must it be shown that if severance is granted there is likelihood that the codefendant will testify?

"(4) What are the demands of effective judicial administration and economy of judicial effort? Related to this is the matter of timeliness in raising the question of severance.

"(5) If a joint trial is held, how great is the probability that a codefendant will plead guilty at or immediately before trial and thereby prejudice the defendant, either by cross-defendant prejudice or by surprise as it relates to trial preparation?"

Id. at 1019-1020 (notes omitted).

In the instant case the majority concludes that no abuse of discretion, amounting to a deprivation of a fair trial, occurred, using the *Byrd* analysis. I am compelled to a different result.

In respect to Factor "1" of *Byrd, supra,* relating to the desire of the movant to have his co-defendant Rosa testify, was, in my view and also according to the majority opinion, met by Sica.

The second factor set out in *Byrd,* the exculpatory nature of the testimony, the majority, quite remarkably, finds "conjectural." At Sica's second request his attorney, Mr. Livingston, said that Rosa would give exculpatory testimony on Sica's behalf if called in a separate trial. It is quoted in full in this opinion, *infra.* (Tr. 364; 411a). In judging that factor it must be kept in mind that Sica was kept in the case at the end of the Government's proofs solely on one theory: that he had silently acquiesced in conversations testified to by Vacarello which suggested that defendants Manella and Rosa at later meetings would be acting on his behalf. The denial of the severance motion served to deprive Sica of the one witness who could have contradicted Vacarello on the



contents of the conversation. The district court did not find that Rosa would not have testified in the manner claimed or that Sica's counsel made the motion in bad faith. The Government's case against Sica was thin, and the testimony of a witness who could impeach the one Government witness upon whom that case depended cannot be regarded as de minimis. There is no element of conjecture present as to exculpatory value.

The majority opinion also concludes in effect that the statement of the reason for severance was not clear, but on August 7, 1975, the following transpired (Tr. 324; 371a):

*"Mr. Livingston* [Sica's counsel]: *It has been represented to me that Mr. Rosa is prepared and has testimony that would tend to exculpate Mr. Sica. I cannot call Mr. Rosa in this trial in view of the fact that he is a defendant on trial. Out of the presence of the jury I am informing the Court that I propose to call him as a witness. He has indicated a willingness to testify on behalf of Mr. Sica but that he will not give up his right to refuse to testify in his own trial. I, therefore, request that the Court sever either Mr. Rosa or Mr. Sica from this particular trial.*

*"The Court:* In other words, you want me to sever Rosa?

*"Mr. Livingston:* I care not, either one, your Honor.

*"The Court:* Either one?

*"Mr. Livingston:* Well, if Rosa is severed he cannot then refuse to testify in his own trial.

*"The Court:* I understand your motion to be sever Rosa, the same motion as Mr. Gondelman[2] made.

*"Mr. Livingston:* It is not the same, I want a trial where I can call Mr. Rosa as a witness and that can be accomplished by my request to sever Mr. Sica because if Mr. Sica is severed and later goes to trial he has no problem that he has now with calling Mr. Rosa as a witness because Mr. Rosa will go to conclusion here and he can be called as a witness at that time in a separate trial." (Emphasis added).

On August 8, 1975, the following transpired (Tr. 364; 411a):

*"Mr. Livingston: It having been represent to me by Mr. Rosa in the presence of his counsel that he could if called exculpate or provide testimony that would tend to exculpate Mr. Sica including but not limited to testimony that Mr. Sica is the father-in-law of Mr. Rosa and Mr. Rosa had a business relationship with Mr. Mannella and on the occasion of July 23 Mr. Sica went along with Mr. Rosa to Mr. Mannella's office and did not participate in any conversation with Mr. Vaccarello or Mr. Mannella as has been testified to by Mr. Vaccarello. It has been by inference suggested to me that there are other matters that Mr. Rosa would not discuss with me. It appearing that other matters may tend to incriminate him. He indicated a willingness to testify to these exculpatory matters, not called in this particular trial. In view of the Court's ruling that*

2. Mr. Gondelman, counsel for Rosa, made an earlier motion for severance of Rosa but on a different ground from that asserted by Sica.



***I cannot either get a severance for Mr. Sica or sever Mr. Rosa from this particular case with this matter now on record I will now before the jury rest as to the defendant Sica.***

*"The Court:* Well, these are the motions that were made yesterday and argued yesterday outside the hearing of the jury. The ruling remains the same." (Emphasis added).

The majority opinion states in respect to a motion for severance, "After the Government rested, Sica's counsel made what must be considered a second request for severance, though the request was none too clear.", *i.e.,* August 7, 1975. I cannot agree with this description of the clarity of the request for severance on either August 7th or 8th; both seem entirely clear to me. The language of the motions is neither subtle nor obscure, but states plainly and coherently the movant's basis for severance. Indeed, I would say the language was "crystal clear".

In respect to the third factor of *Byrd,* the willingness of Sica's co-defendant, Rosa, to testify is difficult to assess in light of the learned Trial Judge's failure to exercise his discretion (discussed in section I of this opinion, *supra*) until the end of the trial and not when Sica's motions for severance were made on August 7 and 8.

The fourth *Byrd* factor, the timeliness of the tender in the light of judicial economy, is urged by the majority, although I am at a loss to understand its position.

Rule 14, Fed. R. Crim. Proc., 18 U.S.C., provides:

*"Relief from Prejudicial Joinder. If it appears* that a defendant or the government is prejudiced by

a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to the court for inspection *in camera* any statements or confessions made by the defendants which the government intends to introduce in evidence at the trial." (First emphasis added). The language of the rule suggests that an effective motion can be made at any time during the course of the trial. Indeed, in *Schaffer v. United States,* 362 U.S. 511, 516 (1960), Mr. Justice Clark stated: "We do emphasize, however, that in such a situation [request for severance] the trial court has a continuing duty *at all stages of the trial* to grant a severance if prejudice does appear." (Emphasis added).

Indeed, the position of the majority in respect to timely filing incorrectly differs from that of the district court, for it was stated by the District Judge in his opinion in this case, *Rosa, supra,* 404 F. Supp. at 614, as follows:

> "The United States submits that raising the issue [of severance], after the government had rested its case in chief was untimely in view of the fact that Rosa was Sica's son-in-law and the five month interval between indictment and trial. However, since there is no evidence that Rosa's willingness to testify at a separate trial became known to Sica prior to that time, we believe it would be improper to base our ruling on that ground since the court has a continuing duty at all stages of the trial to grant a severance if prejudice should appear.", citing *Schaffer v. United States, supra.*[3]



The attitude toward the motions for severance I think should have been treated with greater deference as was done in *Byrd.* In United States v. Gleason, 259 F. Supp. 282, 284 (S.D.N.Y. 1966), the court stated: "It is enough to say that Karp [the movant] has shown persuasive ground for the claim that she needs Pitkin's [the co-defendant's] evidence; that the need must almost certainly go unsatisfied in a joint trial; and that there is substantially greater likelihood of her using him if they are tried separately."

What has been stated in *Gleason,* I deem to be truly applicable here.

It should be most particularly noted that in *Byrd* the opposite result from that favored by the majority in the case at bar was reached, and severance was granted, though the facts favoring severance in *Byrd* were not as strong as in the case at bar.

For the reasons stated, I must respectfully dissent.

I am authorized to state that Judge Aldisert and Judge Gibbons join in this dissent.

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3. The fifth factor admittedly is not involved.

## APPENDIX F.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 75-2411

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UNITED STATES OF AMERICA,
*Appellee,*

v.

JOSEPH SICA,
*Appellant.*

**SUR PETITION FOR REHEARING**

Present: SEITZ, *Chief Judge,* BIGGS, VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS and GARTH, *Circuit Judges*

The petition for rehearing filed by appellant

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,
JAMES HUNTER, III, Judge

Dated: August 2, 1977

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